The Application and Operation

of Certain Provisions

of the

Freedom of Information Act, 1997

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Commentary of the Information Commissioner

in accordance with the provisions of section 39 of the Freedom of Information Act, 1997

March 2003

Contents

Background

On 28 February, 2003, the Freedom of Information (Amendment) Bill 2003 ("the Bill") was published. The Bill envisages a number of changes to the Freedom of Information Act, 1997 ("the FOI Act"). Some of these changes could be described as technical in nature, in effect, tidying up the practical administration of the Act as it stands. Others have a broader approach; amending the scope of the Act in some areas and introducing measures designed to provide an enhanced degree of exemption from release for certain records.

I am conscious that many commentators would like me to state my views on the proposed legislation. I do not intend to do so; it would be entirely inappropriate for me to engage in public debate on the merits or demerits of the Bill. The Constitution provides that the sole and exclusive power of making laws for the State is vested in the Oireachtas and it is the role of the Information Commissioner, in relation to the FOI Act, to implement the legislation passed by the Oireachtas in an independent and impartial manner.

Given the importance of the proposed changes to the Act, however, and having regard to my statutory reporting relationships with the Houses of the Oireachtas, I have decided to publish a commentary under section 39 of the Act. Section 39 provides that

> *"The Commissioner may prepare and publish commentaries on the practical application and operation of the provisions, or any particular provisions, of this Act, including commentaries based on the experience of holders of the office of Commissioner in relation to reviews, and decisions following reviews, of such holders under section 34."*

In the commentary (which is set out in full in Appendix I) I report on my examination of the workings of those sections of the FOI Act which it is now proposed to amend in the Bill. I have focused on the more significant decisions which I have made since April 1998 in applying and operating those sections. I go on to comment on how those decisions would be affected if the new amended provisions had been operating at the time of my decisions. I appreciate that, as a result, the commentary is rather technical and is designed as a working aid for those analysing the Bill rather than for the general reader. However, I have attempted

in the Synopsis which follows, to highlight the salient issues. I have also included in Appendix II, my suggested amendments to improve the operation of the FOI Act which I forwarded to the Department of Finance on 5 February, 2003 after I became aware that a Bill to amend the Act was due to be published during the current Dáil session.

The various exemptions in the FOI Act are designed to protect the public interest and the privacy of individuals. There are two broad categories of exemptions:

- class exemptions where all records in that class or category are exempt e.g. records to which legal professional privilege attaches and
- harm based exemptions where records which might damage a particular public interest are exempt e.g. records which reveal the negotiating positions of public bodies.

Many but not all exemptions may contain what is often referred to as a public interest override i.e. even though a record is exempt under the FOI Act a public body or the Information Commissioner may decide, on balance, that the overall public interest justifies its release. Some exemptions may provide that a public body may refuse to disclose the very existence of a particular record where to do so might disclose exempt information.

Some classes of records may also be excluded from the scope of the FOI Act e.g. records created by the Attorney General, records relating to the President and the private papers of TDs and Senators.

There is also provision in the case of two exemptions - section 23 (Law Enforcement and Public Safety) and section 24 (Security Defence and International Relations) - for a Ministerial certificate which is a final and conclusive refusal and is not appealable to the Information Commissioner. There is however an appeal to the High Court against the issue of a certificate on a point of law in section 42.

General Overview

In the course of preparing this commentary, I became aware of two particular amendments involving section 19 (Meetings of Government) and section 20 (Deliberations of Public Bodies) which, in my view, could create serious legal and other problems in the future and which have the potential to result in costly litigation possibly involving my Office. My concern is not with the merits or demerits of the amendments but with the wider implications of the way in which the amendments are structured.

Section 19

The proposed amendment (in section 12 of the Bill) to section 19 is designed to exempt records of a "committee of officials" set up to assist the Government directly in relation to a particular matter. This is effected by substituting for the definition of "Government" currently contained in section 19(6) a much more far-reaching and constitutionally unrecognisable definition, which is, perhaps, unnecessary to achieve the objective it appears to have been designed to achieve (as explained in the Explanatory Memorandum to the Bill).

The Interpretation Act 1937 provides that, unless the contrary intention appears, the expression "the Government" means the Government mentioned in Article 28 of the Constitution. The definition of "Government" currently contained in section 19(6) of the FOI Act is such that the expression "Government" as used in section 19 will, at a minimum, mean a committee consisting at least of some members of the Government or of some members of the Government, together with one of more Ministers of State and/or the Attorney General.

By contrast, the proposed extension of that definition would admit of the interpretation of the expression "Government" as used anywhere in section 19 as meaning a committee of officials, not one of whom is a member of the Government and, indeed, some or none of whom may be civil servants of the Government or the State.

In relation to the far-reaching nature of the proposed definition it is to be noted that, in addition to Ministers of State and the Attorney General, it is now proposed that a committee

of officials is to be comprehended as included within the definition of "Government". The proposed definition of "officials", in turn, goes so far as to include persons holding a position in the Civil Service of the Government or the Civil Service of the State, special advisers and, in the event of regulations so prescribing in the future, yet further persons who are members of other classes of person. Special Advisers, by definition, occupy or occupied excluded positions (within the meaning of the Civil Service Commissioners Act, 1956), having been selected for appointment to those positions by office holders personally otherwise than by means of competitive procedures or who are employed under contracts for services by office holders, and whose functions or principal functions are or were to provide advice or other assistance to or for office holders.

In addition, apart, altogether, from the constitutional unrecognisability of the definition as so extended, the proposed inclusion of a "committee of officials" within the definition of "Government" is likely to lead to difficulties of interpretation as the proposed amendment does not go so far as to indicate sufficiently clearly, if at all, when the expression "Government" in section 19, would admit of the possibility that a committee of officials is being referred to and when it would not. In other words, the formula chosen to achieve the proposed amendment's goal, appears not to be capable of sufficiently clear or precise application.

In light of this, one could foresee significant levels of, and room for, dispute and argument over those provisions if they were to remain in their current form. Accordingly, one could foresee significant levels of internal review and review applications, cases stated and appeals on a point of law as being likely to be generated by these provisions. For example, the term "Memorandum for Government" is generally understood as one to be submitted to Government by a Minister or by the Attorney General in accordance with the detailed rules laid down in the Cabinet Handbook. Under the amended section 19 a memorandum prepared for a committee of officials appointed under the section would be a memorandum for the Government under the terms of the FOI Act.

The High Level Review Group considered that certain records created by specialist working groups set up by the Government would genuinely fall within the categorisation of "Cabinet records". It seems that such records if submitted to the Government by a Minister on the

Attorney General would be already covered by section 20 (1) (a) of the FOI Act.

Accordingly, it would appear that defining "Government" in such a way as to include a "committee of officials" may be an overly loose, unclear and inefficacious way of achieving what the Explanatory Memorandum sets out as the goal of the proposed amendment.

Section 20

The proposed amendment (in section 13 (1A) of the Bill) to section 20 of the FOI Act provides that the head shall refuse a request where a Secretary General has issued a certificate stating that the record contains matter relating to the deliberate processes of a Department. There would be no appeal to the Information Commissioner or to the High Court against such a decision by a Secretary General.

Given the definition of "head of a public body" in section 2 of the FOI Act it appears that the following would be the position:

> (1) A Minister could not release a record under the FOI Act if the Secretary General of his/her Department or indeed the Secretary General of another Department issued a certificate in writing stating that the record contained matter relating to the deliberative processes of a Department.
>
> (2) The same position would apply in the case of the Attorney General, the Comptroller and Auditor General, the Ombudsman, the Information Commissioner, the Civil Service and Local Appointments Commissioners, the Ceann Comhairle and the chief executives of the numerous public bodies covered by the FOI Act including County Managers.

Accordingly, for example, the Minister for Finance would require to refuse to grant a request for access to a record which was certified by the Secretary General of the Department of Justice, Equality & Law Reform to relate to the deliberative processes of the Department of Agriculture & Food.

Having regard to the functions of Secretaries General of Departments in general, and to the

provisions of the Public Service Management Act, 1997 in particular, it would seem inappropriate that a Minister, as head of a Department, would require to comply with a final certificate issued by the Secretary General of his Department. In addition, it would seem inappropriate, having regard to the same considerations, that a Secretary General of one Department could issue a certificate in respect of the deliberative processes of another Department.

It might be noted in this regard that a Secretary General of a Department even in his / her statutory role as an Accounting Officer is still subject to Ministerial direction with certain safeguards.

There would be an urgent need to establish in what ways the issue of a certificate in respect of a Department's deliberative processes could impinge on the rights of independent Office Holders such as the Comptroller and Auditor General or the Ombudsman who might be in communication with a Department. Section 6 (8) of the FOI provides that nothing in the FOI Act prohibits or restricts a public body from giving access to a record (including an exempt record) otherwise than under the FOI Act unless it is prohibited by law. Where disputes arise between public bodies those bodies may choose to release records outside FOI resulting ultimately in unstructured and confusing situations. This would seem to be at variance with the co-ordination and centralisation of the release of records which seems to be the object of the amendment.

One could also foresee disputes over, and possible challenges to, particular instances of certification and of failures to revoke, or delays in revoking, same by Secretaries General.

Finally, it would seem inappropriate that a certificate issued by a Secretary General under the proposed section 20 (1A)(a) be final when, amongst other considerations, in contrast, a certificate issued by a Minister under section 25 of the 1997 FOI Act is appellable under section 42 to the High Court on a point of law. Moreover, it would seem inappropriate, in circumstances where such a Minister may declare a record to be exempt in such a Certificate by virtue of section 23 [Law Enforcement and Public Safety] or 24 [Security, Defence and International Relations] only if he/she is satisfied that the record concerned is of sufficient sensitivity or seriousness to justify his/her doing so, that a Secretary General of a Department

of State may certify a record of *whatever nature* to relate to the deliberative processes of any Department of State, *whatever their nature.*

Other Significant Changes

(1) Section 24 of the FOI Act is a harm based exemption which protects records whose release could reasonably be expected to affect adversely the security, defence or international relations of the State or matters relating to Northern Ireland. Section 24(2) contains examples of the types or classes of records which may be covered by the exemption providing their disclosure could reasonably be expected to give rise to one or more of the harms identified, e.g. communications between a Minister of the Government and a diplomatic mission or consular post of the State, communications between the Government or a person acting on behalf of the Government and another government or a person acting on behalf of another government etc. The Bill will result in the various categories of records identified in section 24(2) being protected as a class, regardless of their content and it will no longer be necessary to identify a particular harm which might arise from their disclosure. The Explanatory Memorandum does not refer to the fact that the FOI Act already allows for a Ministerial certificate to be issued in the case of sensitive records.

(2) The Bill will also result in the extension of the circumstances where a public body may refuse to disclose the existence of a particular record where to do so might disclose exempt information. The "neither confirm nor deny" response is currently provided for in four circumstances. The Bill will result in its extension to circumstances where the disclosure of a record would disclose information which is exempt on the grounds that the record contains

- information obtained by a public body in confidence (section 26),
- commercially sensitive information (section 27), or
- personal information relating to a party other than the requester (section 28).

(3) The Bill also provides for the protection of a number of additional classes of records, including;

- communications between Ministers dealing with matters under consideration by the Government,

- extension of the period from 5 to 10 years after which records relating to a decision of the Government would be potentially releasable subject to consideration of the various exemptions or the issue of a Ministerial Certificate in the case of sensitive records relating to law enforcement, security, defence, international relations (including Northern Ireland matters)
- records relating to the work of a tribunal or inquiry including preparatory work related to their establishment.

(4) Finally a number of additional categories, currently accessible under the FOI Act, will be excluded, including

- records relating to costings by public bodies of proposals of political parties and
- parliamentary briefing records including records created for the purpose of briefing for parliamentary questions.

Synopsis of the Commentary made under section 39 of the FOI Act

I attempt in this section to provide a brief synopsis of how I applied in particular cases the provisions of the FOI Act that are now to be amended. Technical amendments are dealt with either in Appendix I or in Appendix II.

Appendix I following, goes into much greater detail, sets out the rationale for my decisions and comments on how the Bill might affect the future operation of the FOI Act in these areas.

Section 2 (Interpretation)

Proposed Changes

Section 2 of the Bill includes a proposal to amend the definition of "record", in section 2 of the FOI Act, to clarify that a photocopy or other reproduction of a record is deemed to have the same date of creation as the original record.

Experience To Date

In a High Court judgement arising from one of my decisions, in which I held that replication of a record was not the same as the creation of a new record, the Court remarked that originality is not an essential ingredient in a record and that a person who makes a copy of a record is the creator of that record. This had two implications: the first is that, where a record was created prior to the commencement of the FOI Act and a copy of it is made after commencement, then there is a right of access (subject only to any exemption which might apply) to the copy, although not to the original. The second implication is that section 46 of the FOI Act might not exclude copies of records, created by the Attorney General's Office or the DPP's Office but copied and held by other public bodies, from the operation of the FOI Act.

Comment

The proposed amendment would seem to deal with the first issue identified above.

Section 6(5)(b)

Proposed Amendment

Insofar as a request is for personal information the Bill provides for the word "contain" to be substituted for the words "relate to" where records are concerned. Thus, pre-commencement records may be accessed under this provision of the FOI Act only if they "contain" personal information about the person seeking access to them.

Experience to Date

In one of my decisions I found that all of the records in question could not be said to *contain* personal information about each requester. However, section 6(5)(b) does not require this. I decided that it is sufficient that the record *relate* to personal information about the requester for that section to apply.

In a High Court judgment arising from one of my decisions the Court found that in determining whether a record relates to personal information about the requester, one must see whether there is a sufficiently substantial link between the requester's personal information and the record in question. Where the record does not name or has no express reference to the requester a substantial link will be established if the record relates to something in which the requester has a substantial personal interest, as distinct from something in which he has an interest as a member of the general community or of a large scale class of the same.

Comment

It is clear that records which "relate to" personal information as currently provided encompasses a broader category of records than records which "contain" personal information.

Section 8(4)

Section 8(4) of the FOI Act provides that the motive of the requester may not be taken into account in a decision by a public body.

Proposed Amendment

The proposed amendment provides the insertion of the words "Subject to the provisions of

this Act" before section 8(4).

Experience to Date

In one of my decisions I noted that what can be of little concern to one requester can be of vital concern to another. I found that section 8(4) is incompatible with an approach that would permit public bodies to refuse requests on the grounds that they seemed to be of little value or had no reasonable purpose. This may have some impact on an amendment of section 10.

Comment

I am not clear on the possible effects of this amendment.

Section 10

Parts of section 10 provide for the refusal of a request on the grounds that it is frivolous or vexatious.

Proposed Amendment

One of the amendments proposed under this section expands the grounds for refusal by including situations where the request "forms part of a pattern of manifestly unreasonable requests from the same requester, or from different requesters who, in the opinion of the head, appear to have made the request acting in concert".

Experience to Date

In one of my decisions I set out grounds that might be relevant to a public body arguing that a request was vexatious: a pattern of behaviour, abuse of the process, bad faith. To date, public bodies have not refused access on these grounds to any great extent. I have one such case under review currently.

Comment

I consider the term "frivolous and vexatious" already encompasses the behaviour specified in the amendment.

Section 19

Section 19 contains provisions for refusal of records in particular circumstances to do with meetings of the Government.

Proposed Amendments

Amongst other things section 12 of the Bill provides for the following amendments:

1. mandatory exemption of all Government records covered by substituting the words "shall refuse" for the words "may refuse" in subsection (1)
2. protection for communications between Ministers dealing with matters under consideration by the Government
3. substituting the word "primarily" for the word "solely" to allow for advice created for the primary purpose of Government business to be protected
4. extension of the period during which records are covered under section 19(1) from 5 years to 10 years
5. extending the protection available under 19(1) to records of "a committee of officials", including working groups, where the committee is certified by the Secretary General to the Government as having been established for direct support of Government deliberations and will report directly to the Government. The amendment also includes a definition of the term "officials" which is generally intended to include civil servants and special advisers although it may be extended even more widely.

Experience to Date

I have highlighted my comments in italics.

1. Mandatory Exemption

In its Report to Government, the High Level Group stated that it was "satisfied that the overarching policy of section 19 is that Cabinet records should be exempt from access for a reasonable time and that this is necessary if the Cabinet process and the exercise of collective responsibility are not to be constrained to the detriment of effective decision making based upon the free and frank expression of views (and that) in these circumstances ... the legislation should give clear expression to the policy intent by removing the option of a discretion being exercised".

I note that in proposing this change, the High Level Review Group, referring to my Compliance Report *"The Freedom of Information Act - Compliance by Public Bodies"* stated that "the Information Commissioner has observed (that the exemption) has been applied largely in a mandatory fashion (and) ....that (this) has prompted calls by the

Information Commissioner.....for greater flexibility in its application to allow access to Cabinet records in certain circumstances".

It is clear that my view of the intention of the FOI Act as originally framed differs from that of the High Level Group.

2. Communication between Ministers

While I am aware of cases where such records have been released, I have not issued a decision in this area.

3. Substituting "primarily" for "solely"

In previous decisions I have found that

- an agenda for a meeting of Cabinet is exempt under the FOI Act as it contained information for use solely for the transaction of Government business at a meeting of the Government,
- a record containing provisional dates for Cabinet Meetings did not meet this criteria nor was it a record of Government,
- memoranda and (depending on the circumstance of their creation) draft memoranda for Government are exempt under section 19,
- Departmental observations on draft memoranda for Government are exempt under this section,
- Aides Memoire for Ministers for use at Cabinet meetings are exempt under this section
- Records such as departmental briefing notes prepared for the relevant Minister, notes prepared for the Secretary or Assistant Secretary to the Government prepared solely for the purposes of a meeting of Government are exempt under this section

Some records which were released by reference to the word "solely" might not be released by reference to the word "primarily"

4. Extending the period of protection for records covered by section 19(1) to 10 years

As the existing 5 year term has not been completed no review has arisen. It should be noted, however, that any proposed release under the five year rule is subject to all the other exemptions, including the possibility of a Ministerial Certificate.

5. Extending the protection available under 19(1).

I have made a number of decisions which would have some relevance:

- Documents considered at Cabinet but whose use could not be confined to the

transacting of the business of the Government at a meeting of the Government were not exempt under this section

- Nor was a document prepared for a sub-group of a Cross-Departmental Team which had been submitted as an appendix to a report given to a Cabinet sub-committee but which had not been created for that purpose.

Some records which were released would not be released in future if created by a "committee of officials" of the kind envisaged.

Section 20

I have already made some general comments on this section in the General Overview. Section 20 provides for the refusal of access to documents where the records relate to the deliberative process of the public body and granting the request would be contrary to the public interest.

Proposed Amendments

Amongst others**,** Section 13 of the Bill provides for the following amendments:

1. Extending the protection available for matter relating to the deliberative processes to those of "a public body" as opposed to "the public body concerned".
2. Enabling a public body to refuse a request for a record if a Secretary General of a Department of State has certified that the record contains matter relating to the deliberative processes of a Department of State. Such a certificate must be revoked by a Secretary General once the deliberative processes concerned have ended. While such a certificate is in force, a requester would not be entitled to apply for an internal review or for a review by the Information Commissioner of the decision to refuse a request.
3. The inclusion of a public interest balancing test which would require that a request be granted in cases where the public interest would, on balance, be better served by granting than by refusing the request and the removal of the current requirement, at section 20(1)(b), that the granting of a request would have to be contrary to the public interest before it could be refused.

Experience to Date

Where it has arisen, the question of the "public body concerned" has normally been dealt with during the process of my reviews.

I have made relevant decisions as follows:

- I have exempted records where the deliberative process is ongoing and its release is contrary to the public interest (e.g. pilot whole school evaluations)
- I have found that records did not form part of the deliberative process of the public body (e.g. administrative advice for the Clerk of the Seanad in relation to a possible visit by the President of the European Commission)
- I have found that records did relate to the deliberative process but their content was such that release would not be contrary to the public interest (e.g. the type of transport to be used by Taoiseach on an official visit overseas, Report of the Pensions Board to the relevant Minister concerning a Pensions Ombudsman).

Comment

The effect of the proposed amendment would mean that a record declared as relating to the deliberative process of a public body could only be released if its release was in the public interest. While still subject to the public interest override, it appears that an individual Secretary General (most likely but not necessarily in a central Department) could prevent the release under the FOI Act of certain documents held in other Departments and public bodies.

Section 21

Sections 21 (1) (a) and 21 (1) (b) provide protections to records where access to the record concerned could prejudice the functions and negotiations of public bodies.

Proposed Amendments

The sub-sections are to be amended by providing a revised wording for paragraphs (a) and (b) to the effect that the Principal Act will extend the protection available to any public body, not just the public body the subject of the request.

Experience to Date

Some concerns have been expressed that records held by a particular public body could be releasable if those records had not been created by that body. I have recognised in some of my decisions that more than one Department comprises "the Official Side" for the purposes of pay negotiations.

Comment

The amendment seems designed to centralise or co-ordinate the approach to release where more than one public body is involved.

Section 22

Section 22 of the FOI Act provides protection to parliamentary, court and other matters.

Proposed Amendment

Section 15 of the Bill inserts a new subsection in section 22 of the FOI Act and will provide a new exemption for records relating to tribunals and other bodies appointed to inquire into specified matters. As it stands, section 46(1)(a)(ii) of the FOI Act currently excludes from the operation of the FOI Act certain records held by a tribunal to which the Tribunals of Inquiry (Evidence) Act, 1921, is applied, ... and relating to, or to proceedings in, ... such a tribunal other than (I) a record that relates to proceedings in ... such a tribunal held in public but was not created by the ... tribunal and whose disclosure to the general public is not prohibited by .... the tribunal, or (II) a record relating to the general administration of .... such a tribunal or any offices of such a tribunal.

Section 15 of the Bill provides a new mandatory exemption for records held by a public body relating to the work of a tribunal or inquiry (as defined) including preparatory work related to their establishment.

Experience to Date

One case which came before me concerned the administrative records of a Tribunal concerning primarily fixed assets (e.g. office equipment) which the public body claimed were excluded from the provisions of the FOI Act pursuant to section 46(1)(a)(ii). It was argued, inter alia, that the records were records of a Tribunal, the originals of which were in the possession of a public body solely for a particular purpose. As the request was withdrawn, it was not necessary for me to make a formal decision in this case.

Comment

No comment.

Section 23

Section 23 of the FOI Act contains provisions for refusal of access on grounds of law enforcement and public safety.

Proposed Amendment

Section 16 of the Bill proposes an amendment in section 23 of the FOI Act to provide additional grounds for exemption where release of a record could reasonably be expected to "endanger the life or safety of any person".

Experience to Date

To date, issues of personal safety have arisen in only a very small number of cases which have come before me for review. However, where this issue does arise, it is a very serious matter as it would be quite unacceptable that the FOI Act should have the effect of putting anyone's personal safety at risk. The perceived risk may relate to the requester, to staff of the public body concerned or to third parties (usually family, friends or neighbours of the requester). In some cases, the risk may be one of damage to property of an individual or organisation. The FOI Act, at present, does not have an explicit exemption designed to protect personal safety or to protect property.

On 3 February 2003 I published a discussion document on this issue (available on my Office website) which considered a number of typical risk scenarios as well as a number of possible options already provided for in section 23 and in section 28(3). The discussion document concludes: "It is clear the FOI Act, while not having a specific exemption to ensure the personal safety of third parties or their property, does have a number of provisions which might be invoked to achieve the same purpose. Ultimately, a specific "personal safety" exemption might be useful; but even with such a provision, it remains the case that informing the requester that such a provision (or one of the section 23 options outlined above) is being invoked creates difficulties. This is because the requester will be put on notice that some people are in fear of him/her. Finding a solution to this dilemma will require considerable further thought."

Comment

The amendment still leaves open the possibility of a violent reaction to the use of the exemption.

Section 24 (as qualified by section 25)

Section 24 provides for the exemption of records that could reasonably be expected to affect adversely the security of the State, the defence of the State, the international relations of the State, or matters relating to Northern Ireland.

Proposed Amendments

Section 24(2) currently provides specific examples of the types of records which may be covered by the exemption in 24(1). It is not sufficient, however, for the public body to show merely that the record is a type which comes within the scope of section 24(2). It must also satisfy me that the disclosure of the record could reasonably be expected to affect adversely one or more of the functions identified in section 24(1).

Section 17 of the Bill provides for the amendment of subsections (1) and (2) to provide a mandatory class exemption for the records specified in subsection (2) and eliminates the need for the identification of a specific harm which might arise from their disclosure.

Experience to Date

I have made relevant decisions as follows:

- I have found that access to certain records containing information communicated in confidence from, to or within international organisations of states should be refused
- I have found material whose release could reasonably be expected to adversely affect the international relations of the State should be refused (e.g. internal descriptive discussions of European developments, note of a sensitive telephone conversation between a Department official and the Finnish Security Director, report of confidential conversation etc.)
- I have found that routine communications between an Irish embassy and the Department of Foreign Affairs containing information already in the public domain could not reasonably be expected to affect the international relations of the State
- I have found that there will be occasions where a "security clearance" record can reasonably be expected to adversely affect the security of the State
- I have found that particular "security clearance" records should be released as their contents - which I carefully assessed - could not reasonably be expected to adversely

affect the security of the State

- I have found that a list of file titles and their reference numbers could reasonably be expected to adversely affect matters relating to Northern Ireland.

Comment

Under the Bill as proposed it will not be possible to examine these types of records as to whether their content could reasonably be expected to have the adverse effects described in the Act. It is noteworthy that section 25 already provides for a Ministerial Certificate in the case of sensitive material and that there is no public interest test.

Section 26

This section of the Act is concerned with information obtained in confidence.

Proposed Amendments

A similar amendment to those in sections 20 and 21 is proposed in terms of substituting "a public body" for "the public body".

Comment

My comments are similar to those in sections 20 and 21.

Sections 26, 27 and 28

The provisions of sections 26, 27 and 28 refer to information received in confidence, commercially sensitive information and personal information respectively.

Proposed Amendments

The Bill provides for an amendment to these sections whereby a head will be allowed to refuse to confirm or deny the existence of a records where the record is covered by an exemption under these sections.

Experience to date

The FOI Manual produced by the Central Policy Unit of the Department of Finance explains that the use of the 'neither confirm nor deny' provisions will be justified only in rare situations and that such a provision is necessary because, in some instances, merely confirming the existence of information will directly or implicitly disclose sensitive information. I have had no cases under these sections where the issue arose.

Comment

I recognise that there may be circumstances where records contain material of such a sensitive nature that I should be in a position to uphold a decision a public body under one of the 'neither confirm nor deny' provisions but such a decision must be supported by reasonable argument. I am not aware of the reasons for including such a provision in these sections.

Section 46(1)(d)

Section 46(1) of the Act identifies particular classes of records to which the Act does not apply.

Proposed Amendments

Section 46 (1) is to be amended by inserting new paragraphs before paragraph (e), the purpose of which is to 1) exclude from the Act a record relating to the costing by a public body of a proposal of a political party and 2) to restrict the Principal Act from applying to parliamentary briefing records including records created for the purpose of briefing for parliamentary questions (whether oral or written).

Experience to Date

I have not issued a decision in relation to the subject of the first proposed amendment. I did, however, receive an appeal on 3 December, 2002 on a related case seeking the costings provided by the Department of Finance to various political parties in the run-up to the last election. The review is ongoing and a decision should issue shortly.

Comment

It is clear that the amendment proposed would exempt such cases in future.

With regard to the second proposed amendment my experience of the operation of the Act over the course of my reviews has been that this material has generally been released as a matter of course. In the case of Mr. ABD and the Department of Marine and Natural Resources, however, I was made aware that the Department, as part of its original decision, released to Mr. ABD a copy of a parliamentary question from Mr. Enda Kenny TD along with the reply by Minister Michael Woods and supporting information. As I had no need to review records already released I did not have sight of the "supporting information" mentioned above. As such,

I am not in a position to say definitively if the information in this case constituted the type of record envisaged in the proposed amendment. If it did, the proposed amendment would mean that the Act would no longer apply to them.

Comment

This would have the effect of pulling back on information which is accessible at present although of course the briefing records could be covered by other exemptions.

Section 47

Section 47 currently provides for the charging of fees by public bodies in respect of the grant of a request under the Act.

Proposed Amendment

Section 26 of the Bill allows for the charging of a fee (as prescribed by the Minister for Finance) in respect of a request for access to non-personal records and for the charging of fees in respect of applications for internal review and in respect of an application for review to my Office.

Experience to date

The experience of my Office to date is that relatively few applications for review relate to a decision of a public body to charge a fee. Whereas 10 such applications were accepted for review by my Office in 1999, only 5 such applications were accepted in 2000 and only 1 in 2001. Where applications are received in such cases they can sometimes be resolved be agreement between the parties. Where a decision has been necessary, my decisions have, in the majority of cases, affirmed the public body's decision to charge the fee. It is also apparent to me from the many cases which come before me on review, that frequently public bodies do not charge fees or deposits as provided for in section 47.

Comment

It is unclear what the effect of the new paragraph 6(A)(d) will be - will an application fee and a search/retrieval fee and copying fee be chargeable? Also, will the fees be chargeable at each stage of the process on a cumulative basis?

Appendix I

Commentary made under section 39 of the FOI Act

This Appendix describes in detail my key decisions and experiences in connection with the particular sections of the FOI Act which it is proposed to amend.

SECTION 2

Section 2 of the Act as currently framed defines a record as:

> "record" includes any memorandum, book, plan, map, drawing, diagram, pictorial or graphic work or other document, any photograph, film or recording (whether of sound or images or both), any form in which data (within the meaning of the Data Protection Act, 1988) are held, any other form (including machine-readable form) or thing in which information is held or stored manually, mechanically or electronically and anything that is a part or a copy, in any form, of any of the foregoing or is a combination of two or more of the foregoing;

Proposed Changes

Section 2 of the Bill includes a proposal to amend the definition of "record", in section 2 of the Act, to clarify that a photocopy or other reproduction of a record is deemed to have the same date of creation as the original record.

SAMPLE CASES

Mr ACD and the Department of Justice, Equality and Law Reform (99003)

Decision

In this case I directed that the requester should be given access to a number of records, which concerned the trial in the Circuit Court of another party for the attempted murder of the requester. The records I had directed to be released included the typed transcripts of the trial; various witness statements; the statement of the defendant (subject to the deletion of parts thereof) and two claims in respect of fees. The Department appealed my decision on a point

of law to the High Court. The High Court delivered its judgement on 14 March 2001.

The Court held that my decision was not correct insofar as it granted access to a transcript of the proceedings and to certain witness statements. The Court found that the Book of Evidence was a record created by the Director of Public Prosecutions or his Office. It further found that the witness statements, which were contained in the Book of Evidence compiled by the Director of Public Prosecutions, were created by the Director or by his Office. The Court, in response to the argument that photocopying involved the replication rather than the creation of a record, remarked that originality is not an essential ingredient in a record and that a person who makes a copy of a record is the creator of that record. While it appears this was an *obiter* statement, and not a binding interpretation of the law, it has two significant implications. The first is that, where a record was created prior to the commencement of the FOI Act and a copy of it is made after commencement, then there is a right of access (subject only to any exemption which might apply) to the copy, although not to the original. The second implication is that section 46 of the Act would not exclude copies of records, created by the Attorney General's Office or the DPP's Office but held by other public bodies, from the operation of the Act. The full text of this High Court decision is available on my Office website.

Comment

The proposed amendment would seem to deal with the first issue identified above in that a copy of a pre-commencement record, where the copy is made after the commencement of the Act, will be deemed to have been created at the same time as the original, i.e. pre-commencement.

SECTION 6(5)(b)

Section 6(5)(b) of the Act as currently framed, provides a right of access:

> **6** (5) ....where .....
> (*b*) records created before such commencement relate to personal information about the person seeking access to them,

Thus, currently, a right of access to records created prior to the commencement of the Act arises, inter alia, if the records *relate* to personal information about the person seeking access to them (section 6(5)(b)). For most public bodies the commencement date is 21 April 1998.

Proposed Amendment

Section 4 of the Bill provides for the word "contain" to be substituted for the words "relate to" above, thus pre-commencement records may be accessed under this provision of the Act only if they "contain" personal information about the person seeking access to them.

SAMPLE CASES

Mr ABM & Others and the Revenue Commissioners (99017)

The requesters had sought access to correspondence relating to the tax affairs of each of them as individuals and to their companies. The records sought were, with one exception, created before the commencement of the Act. I considered the distinction between records which "relate" to personal information and records which "contain" personal information.

Decision

I found that all of the records in question could not be said to *contain* personal information about each requester. However, section 6(5)(b) does not require this. I decided that it is sufficient that the record *relate* to personal information about each requester for that section to apply. It was clear that the records were created solely in the context of, and for the purposes of, dealing with the tax affairs of particular companies and individuals. In the circumstances, I found that the records related to personal information about the individuals concerned i.e. they related to information held by the Revenue on the understanding that it would be treated as confidential and required for the purpose of assessing the liabilities of

these individuals to tax. I found that section 6(5)(b) applied in the case of the five individual requesters and thus the records were within the scope of the review.

Ms ACM and the Midland Health Board (99175)

The requester sought access to records of the assessment of his children which had been created prior to the commencement of the FOI Act. Having examined the records, I was satisfied that they were created in the context of concerns raised about the requester's children at a time when allegations of sexual abuse had been made against him. The records related to a health board's enquiry into the possibility that the children may have been abused by the requester.

Decision

I found that the records had been created directly in connection with personal information about the requester or joint personal information about the requester and his children. Thus, even if parts of the records did not specifically mention the requester, I was satisfied that they *related* to personal information about him. I found that section 6(5)(b) applied.

I should, of course, stress that where a right of access arises pursuant to section 6(5)(b), the requester is not automatically granted access to the records and the granting of access is subject to the other provisions of the Act. In this case, for example, I decided that the requester should be granted access to only parts of the records in question and that access to the remaining parts of the records should be refused as those parts were exempt under another provision of the FOI Act.

EH and the Information Commissioner, The High Court

In an earlier decision, Case No. 99011 Mr ABK and the Eastern Health Board (Office of the Information Commissioner, Decisions, Volume 3, page 64), I decided that access to certain pre-commencement records should be refused. On appeal in the High Court, Mr J O'Neill considered the application of section 6(5)(b) of the Act (EH and Information Commissioner, The High Court, Mr J O'Neill, 21 December 2001).

Judgment

Mr J O'Neill stated that it was clear from the use of the words "relate to" that a document need not itself contain personal information about the requester. In his view the test to be applied in determining whether a record relates to personal information about the requester is "whether there is a sufficiently substantial link between the requester's personal information (as defined in the Act) and the record in question". He stated -

> "The record will generally speak for itself. Where a doubt or ambiguity exists, as to the connection of the record to the requester, a consideration of factors such as the circumstances in which the record was created, the purpose for which the record was created and whether it was created with the affairs of a particular individual in mind, may *inter alia*, assist in determining "whether there is a sufficiently substantial link between the requester's personal information (as defined in the Act) and the record in question....
>
> Where the record does not name or has no express reference to the requester a substantial link will be established, if the record relates to something in which the requester has a substantial personal interest, as distinct from something in which he has an interest as a member of the general community or of large scale class of the same"

Comment

It is clear that records which "relate to" personal information as currently provided for in section 6(5)(b) encompass a broader category of records than records which "contain" personal information about the requester and more pre-commencement records may be potentially accessible under the existing provisions. The effect of the High Court judgement of O'Neill J was to affirm the approach in relation to the distinction between "contain" and "relate".

Even if section 6(5)(b) is found to apply, i.e. a right of access arises to certain pre-commencement records, those records are only potentially accessible. The records must still be considered in the context of the other provisions of the FOI Act and access will not be granted where they are found to be exempt under other provisions the Act.

SECTION 8(4)

Section 8(4) of the Act as currently framed, states:

> **8**(4) In deciding whether to grant or refuse to grant a request under *section 7*
>
> (*a*) any reason that the requester gives for the request, and
>
> (*b*) any belief or opinion of the head as to what are the reasons of the requester for the request, shall be disregarded.

The section is concerned with the motive of the requester and provides that it may not be taken into account in deciding whether to grant or refuse a request under the Act.

Proposed Amendment

Section 6, paragraph (b) provides the insertion of the words "Subject to the provisions of the Act," at the beginning of subsection (4).

SAMPLE CASES

Ms ACF and the North Eastern Health Board (99001)

In this case I considered the relevance of the identity of the requester to the public interest arguments which arose.

Decision

In my decision I made the following comments with respect to section 8(4) and the public interest -

> "...[A]ny motive which the requester may have in seeking the information must be disregarded for the purpose of the decision under FOI. It also means that a requester need not show that he or she has any particular standing in order to make an FOI request. It could be argued, therefore, that little or no weight should be attached to the arguments that the requester, as a person who was in the care of the Board, should have access to information concerning her care. It seems to me, however, that section 8(4) does not necessarily mean that in certain particular cases the identity or history of the requester may not be relevant to a decision regarding the public interest in the release of

information. In this case the requester was placed in the voluntary foster care of the Board and subsequently taken into wardship by the High Court following an application to the High Court by the Board. There is a public interest in the requester (and any person who might be in a similar situation) having access to information which would enable them to assess the performance of the Board in its dealings with them. Any actions, or indeed inaction, of a health board in cases of this nature would be matters of concern to the individuals and families involved and in some cases may be of concern to the public at large."

Comment

It is not clear how it is considered that the amendment proposed might affect the working of section 8(4).

SECTION 10 (1)

Section 10(1) of the Act as currently framed states:

> **10** (1) A head to whom a request under *section 7* is made may refuse to grant the request if
>
> (*a*) the record concerned does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken,
>
> (*b*) the request does not comply with *section 7 (1) (b)*,
>
> (*c*) in the opinion of the head, granting the request would, by reason of the number or nature of the records concerned or the nature of the information concerned, require the retrieval and examination of such number of records or an examination of such kind of the records concerned as to cause a substantial and unreasonable interference with or disruption of the other work of the public body concerned,
>
> (*d*) publication of the record is required by law and is intended to be effected not later than 12 weeks after the receipt of the request by the head,
>
> (*e*) the request is, in the opinion of the head, frivolous or vexatious, or
>
> (*f*) a fee or deposit payable under *section 47* has not been paid.

Proposed Amendments

Section 7 of the Bill proposes three amendments to section 10(1) of the Act, viz.

1. The deletion of "other" in paragraph (c) and its stated objective is to clarify that substantial and unreasonable interference with or disruption of the work of the public body - whether of the particular unit or section or of the body generally - can constitute grounds for a refusal of the request.
2. The expansion of the grounds for refusal set out in paragraph (e) by including situations where the request "forms part of a pattern of manifestly unreasonable requests from the same requester, or from different requesters who, in the opinion of the head, appear to have made the request acting in concert".
3. The expansion of the grounds for refusal set out in paragraph (f) to allow for the refusal of a request where the requester has failed to pay a fee or deposit under section 47, whether in respect of the current request or a previous request.

SAMPLE CASES

The first proposed amendment, to paragraph (c) of section 10(1), appears designed to remove a potential confusion and it has not arisen as an issue in the course of any review by me. The second proposed amendment expands on the circumstances in which a request might be refused under 10(1)(e) dealing with requests which are frivolous or vexatious.

Mr. ABK and the Eastern Health Board (99011)

The relevance of section 10(1)(e) was one of the issues considered by me in this case. The requester had sought access to records relating to himself, his former partner and his daughter. The Eastern Health Board (EHB) refused the request on the basis that all relevant information had already been made available to the requester by means of discovery in earlier court proceedings and that therefore the request was frivolous and vexatious within the meaning of section 10(1)(e).

Some of the records had been made available to the requester subject to specific conditions imposed by the High Court that he preserve their total confidentiality. The EHB argued that disclosure of any of these records would constitute contempt of court. It also argued that disclosure could reasonably be expected to prejudice the fairness of future proceedings.

Decision

In my review decision I found that the request could not be considered to be frivolous. I considered that in some circumstances a request for access to records, which a requester already has, could be described as frivolous. However, I found that Mr ABK held some of the disputed records subject to conditions which operated to his disadvantage and what he was seeking to do was to place himself on the same footing as any other requester. I considered that the EHB's view that the request was vexatious was based on its experiences with the requester over the years. However, I accepted that Mr ABK's purpose in making the request was to advance his case and, therefore, the request could not be said to be vexatious. For other reasons, however, I ruled against release and my substantive decision was upheld by the High Court.

Mr. ABW and the Department of Enterprise, Trade and Employment (99151)

Section 10(1)(e) was also considered by me in this case. While this case related primarily to a question of fees, the Department contended that the requester was abusing the FOI Act.; it suggested that its approach "must be viewed in the context of an individual who has made 182 requests to this Department (67 more than the entire Irish media added together)".

Decision

Whereas the Department had not relied on section 10(1)(e) in its decision in this case, in my decision I set out my thinking on how that provision might apply. Having considered the meaning of the term "frivolous or vexatious" in the light of Irish case law and having examined in some detail the operation of the Ontario Municipal Freedom of Information and Protection of Privacy Act, which has provisions very similar to those in our Act, I concluded:

> It is clear that the Act intends to grant a far reaching right of access to records held by public bodies. The right is a general right, not confined to a specific class of requesters and therefore capable of being exercised by a large number of persons. The Long Title also recognises that there are necessary exceptions to this right. The Act, in its specific provisions, sets out these exceptions in great detail. The proper application of such exceptions requires care on the part of a public body and can be a difficult and time-consuming exercise.
>
> The Act also requires, both in its Long Title and in section 6(2), that a public body give

reasonable assistance to a person who is seeking a record under the Act. It goes on to provide in great detail how requests should be dealt with, imposing strict requirements on public bodies to redirect requests to the appropriate body, to deal with requests within a strict deadline, to provide for a review by a more senior official of a request which has been refused, to explain the reasons for its decisions and to inform requesters of their rights of appeal.

In short, the Act demands that public bodies meet very high standards in dealing with requests. This as it should be; but the corollary is that the legislation assumes reasonable behaviour on the part of requesters. It could hardly have been the intention of the Act that a public body be required to go through the rigorous processing requirements of the Act in cases where the requester makes no effort to co-operate with the reasonable requirements of the public body. More particularly, it seems to me that certain patterns of conduct by requesters and attempts by requesters to circumvent the provisions of the Act can constitute an abuse of the process of making an FOI request and that such requests may be refused on the grounds that they are frivolous or vexatious.

The Department has given examples of certain requests made by Mr ABW which it says were frivolous or vexatious. Since it is not necessary for the purposes of this decision, I make no findings in relation to these specific claims. However, in broad terms, I identify below certain patterns of conduct which, in my view, constitute or may constitute an abuse of the processes set out in the Act. In these cases it may be correct for a public body to refuse a request on the grounds that it is frivolous or vexatious.

<u>Submission of a series of requests on the same topic</u>

Requests made by the same person in or around the same time as part of a series of requests dealing with the same topic may sometimes (but not always) be treated as frivolous or vexatious. In such cases, it may clearly be inefficient from an administrative point of view and of no benefit to the requester to deal with the requests singly. In my view the Oireachtas could not have intended that public bodies be forced to deal with requests in the most administratively inconvenient way possible. In situations of this kind, it is reasonable for a public body to discuss with the requester whether the requests can be consolidated or otherwise dealt with in a way which will

ease the administrative burden on the body. If the requester, *without good cause*, fails to agree to such suggestions, then one has to question whether the requester's concern is with gaining access to records or with forcing the public body to engage in the process of dealing with the request. In such cases, the head might understandably form the opinion that particular requests in the series are frivolous or vexatious.

Where the number of requests submitted by the requester is very large

Of itself, the fact that a requester has submitted a 'large' number of requests does not indicate that any of these requests is frivolous or vexatious. Apart from any other consideration the question of what constitutes a 'large' number of requests is so subjective as to be of little value, in practice, in determining whether section 10(1)(e) might apply. Also, the number of requests received by a public body, both generally and from any one requester, must depend in part on its attitude to the release of information. For example, if a public body routinely resists requests for information which, perhaps, other public bodies would release administratively then it may end up receiving a large number of FOI requests. It could hardly be correct that its subsequent difficulties in processing these requests should be laid at the door of requesters who are merely seeking to exercise their statutory rights. In saying this I am not suggesting that the difficulties which the Department has experienced with Mr ABW in the instant case are of its own making. I merely make the point to show the difficulties in refusing requests solely because the requester has made a large number of requests.

The Act does recognise that dealing with certain requests could cause a substantial and unreasonable interference with or disruption of the other work of a public body and it allows such requests to be refused under section 10(1)(c). The section refers to 'request' (singular) but it seems to me that, in the light of section 11 of the Interpretation Act 1937 (which provides that every word importing the singular shall, unless the contrary intention appears, be construed as if it also imported the plural), the section is apt to cover a situation in which one requester makes a large number of requests over a short period of time, the processing of which would cause substantial and unreasonable interference with or disruption of the other work of a public body.

Both section 10(1)(c) and section 9, which provides for deferral of access in certain cases, are a clear recognition that public bodies should not be called upon to shoulder

unreasonable administrative burdens. The fact that the Act does not identify in exhaustive detail the circumstances in which such unreasonable burdens might arise does not mean that public bodies are in an administrative straitjacket, forced to process requests regardless of whether it is reasonable to do so or not. A request or requests for an unreasonably large number of records which is made in abuse of the process of the Act may take a request out of the realms of section 10(1)(c) and into those of section 10(1)(e).

While a large number of requests of itself need not be an indication of an abuse of the Act, if the number of requests made by one requester at or about the same time or in close succession is so great that no public body could possibly be expected to deal with them properly i.e. in accordance with the strict requirements imposed by the Act, then this may indicate that the request is frivolous or vexatious. If the requests all deal with the same topic and the requester, *without good reason*, refuses to agree to some system of consolidating such requests, then this would further suggest that the request is frivolous or vexatious. Where the requests are on diverse topics then it is reasonable for a public body to ask whether the requester can prioritise these requests and agree a timetable for dealing with them. Where, *without good cause*, the requester refuses to do so, then it seems to me that this is an indication that the making of certain (if not all) of the requests may be an abuse of the process of the Act and, consequently, be frivolous or vexatious.

In making these comments, and my earlier comments on series of requests, I do not wish to suggest that public bodies can be exonerated from duties which are clearly imposed on them by statute. They should not be taken as an encouragement to public bodies to ignore the rights of requesters. I make them because it seems to me that a public body is entitled to take account of what is reasonable when faced with a large number of requests, at or about the same time, from the one requester. ...

Requests made in bad faith

All of the preceding examples identify patterns of conduct or behaviour which may constitute an abuse of the processes set out in the Act. Clearly where a requester's pattern of behaviour involves an abuse of process the fact that he or she is unwilling to co-operate with the public body is evidence of bad faith on the part of the requester.

But the Mitchinson decision, dealt with earlier, makes it clear that a request could be made in bad faith (i.e. for an illegitimate or dishonest purpose with furtive design or ill will on the part of the requester) without any pattern of behaviour being present.
In practice, and in the absence of a pattern of conduct, a public body may often find it difficult to establish bad faith on the part of the requester in relation to a request. Until such a case comes before me, I would be reluctant to speculate as to particular circumstances which might be indicative of requests made in bad faith. However, on the basis of experience to date, it may be helpful to say that simply because it is clear that a requester may use the information obtained in a manner which may be disadvantageous to the public body does not imply that the request is made in bad faith.

Frivolous or vexatious - conclusion

The refusal of requests on the grounds that they are frivolous or vexatious is not something that should be undertaken lightly by public bodies. In my view, section 10(1)(e) of the FOI Act is restrictive in scope, given the terms of the Act generally and, in particular, the provisions of section 8(4) thereof, which require any reasons behind a request, whether given by the requester or perceived by the public body, to be disregarded. Public bodies should avoid imputing motives to requesters on the basis of which requests are then refused under section 10(1)(e). They should not assume that the fact that requests cause them administrative inconvenience is good enough cause to refuse requests on these grounds. As Assistant Commissioner Mitchinson pointed out, the receipt of frivolous or vexatious requests from a particular individual in the past is not *in itself* sufficient to conclude that a new request is *automatically* frivolous or vexatious. Each request must be considered on its own merits as measured against the relevant criteria.
Cases of bad faith aside, whether a request is frivolous or vexatious should be judged by reference to the pattern of behaviour of the requester in relation to the FOI request or requests under consideration. Requesters who are heavy users of the Act, and incidentally who may benefit considerably from the rights conferred by it, have a corresponding responsibility to act reasonably in relation to the processing of their requests by public bodies. Unreasonable or uncooperative behaviour by a requester in relation to the processing of a large number of requests made by him or her may justifiably lead to the conclusion that certain (if not all) of the requests on hand from

that requester are frivolous or vexatious."

Comment

I am aware that there is a small number of FOI requesters whose behaviour is regarded by certain public bodies as falling into the category of "frivolous or vexatious". My own Office has a small number of review applicants whose pattern of application may indicate abuse of the FOI process; for example, I have dealt with 39 separate reviews from one individual and currently have eight open reviews on hands from that same individual.

One of the difficulties in relation to the proper construction of section 10(1)(e) is that it is rarely invoked by FOI decision makers and, accordingly, has not arisen as a substantive issue in a review concluded by my Office. (It is, however, an issue in some current reviews.) As will be clear from the lengthy extract cited above, I believe the terms "frivolous or vexatious" already contain the notions of bad faith and abuse of process and it is a matter for public bodies to apply these in appropriate cases. The question arises whether the proposed amendment simply identifies what is already inherent in the existing wording or whether it actually provides additional grounds for refusing a request. If the former is the case, the use of the word "or" in the proposed amendment may be problematic as it suggests the addition of something not already captured by the term "frivolous or vexatious".

The third proposed amendment in section 10(1) relates to the question of fees and the right to refuse a request where a fee has not been paid whether in the present request or in relation to a previous request. In my decision in **Case No. 99151** I commented as follows on the question of fees and the possible abuse of the provisions relating to fees:

"Requests which abuse the provisions of the Act dealing with fees

I do not intend to deal exhaustively with the question of what constitutes abuse of the provisions dealing with fees. However, it seems to me that abuse could arise in two ways.

The first is through requesters seeking to avoid the charges provided for by the legislation. An example of what I have in mind here is a situation where a requester, having been advised of the estimated fee to search for and retrieve records, seeks to

access a lesser number of records thus reducing the fee. Such a requester might then seek to access the remaining records by making a second FOI application, claiming that the records have already been retrieved and that no fee is therefore payable in respect of the second request. In my view, requests which are clearly designed to do this may be considered to be an abuse of the Act and may stand the risk of being refused as frivolous or vexatious.

The second could arise through invoking the procedures in section 47(8) (which requires a head to specify the amendments to the request which would reduce or eliminate a deposit). Where the pattern of behaviour of the requester suggests that section 47(8) is being invoked for some purpose other than its true purpose, which is to see if any resolution of the question of the fee can be reached, then the public body might, in an appropriate case, conclude that this is an abuse of the Act. Such a conclusion might, in an appropriate case, also suggest that the request itself might be frivolous or vexatious."

Comment

The issue of refusing a request under the present section 10(1)(f) - where a fee or deposit has not been paid - has not arisen in the course of a review by me. However, as is clear from the lengthy extract cited above from my decision in ***Case No. 99151****, I believe great caution must be exercised in taking account, in deciding one request, of the behaviour of the requester in an earlier request.*

SECTIONS 15 AND 16

The Bill proposes a number of amendments to section 15 of the Act, principally, the deletion of subsection 4, changes to the reporting year of the Department of Finance and a definition of "published" which includes publication by electronic means (the latter amendment is proposed to apply also to section 16).

Comment

Subsection 4 requires the Department of Finance to compile and publish summaries of the information manuals which each public body is required to publish in relation to itself under

section 15(1); the Department is also required to keep such summaries up to date and to re-publish "not less frequently than 3 years". Given that almost 400 public bodies are now subject to the FOI Act, the task of compiling and publishing summaries of these bodies' information manuals is very significant. The experience of my Office is that, provided the public bodies themselves publish the required information manuals, there is no obvious requirement that summaries be published by the Department of Finance.

The proposed amendment to the definition of "published" would have the effect of enabling public bodies to satisfy the publication requirement in relation to information manuals by means of electronic publishing only. Sections 15 and 16 of the Act require the publication by each public body of certain information about the body itself and about the schemes and services administered or provided. The section 15 manual is, at present, referred to in the Act as a "reference book" whereas no such description is used in the case of the section 16 manual.

In September 2000 I published a study into the two information guides which public bodies are required to publish under sections 15 and 16 of the FOI Act. The section 15 manual is a guide to the functions of, and records held by, the particular public body. The section 16 manual is a guide to the rules and practices which govern how the particular body conducts its business. These two publications form a very important element in the overall commitment, represented by the FOI Act, to ensuring that the public has access "to the greatest extent possible" to "information in the possession of public bodies". The manuals are designed to facilitate the public in knowing how the particular public body is structured, the precise range of its activities and responsibilities, as well as the detailed rules and guidelines followed by that body in its dealings with the public. This latter provision, clearly, is an attempt to place the public on a more equal footing with the public body in relation to dealing with that body.

In my study of September 2000 I suggested that, in publishing these manuals, full use should be made of electronic media by ensuring that the manuals are made available on websites and, where appropriate, in other electronic formats. I pointed out that electronic publishing has the advantage of enabling relatively easy updating of material. However, I did suggest

that where a manual is to be published solely by electronic means, a summary booklet listing and summarising the material available on the electronic version also should be published. To this I would now add, where a manual is published in electronic format only, that where a person requests a print-out, in whole or in part, that this request should be met.

SECTION 19

Section 19 as currently framed states:

19.(1) A head may refuse to grant a request under *section 7* if the record concerned

(*a*) has been, or is proposed to be, submitted to the Government for their consideration by a Minister of the Government or the Attorney General and was created for that purpose,

(*b*) is a record of the Government other than a record by which a decision of the Government is published to the general public by or on behalf of the Government, or

(*c*) contains information (including advice) for a member of the Government, the Attorney General, a Minister of State, the Secretary to the Government or the Assistant Secretary to the Government for use by him or her solely for the purpose of the transaction of any business of the Government at a meeting of the Government.

(2) A head shall refuse to grant a request under *section 7* if the record concerned

(*a*) contains the whole or part of a statement made at a meeting of the Government or information that reveals, or from which may be inferred, the substance of the whole or part of such a statement, and

(*b*) is not a record

(i) referred to in *paragraph (a)* or *(c)* of *subsection (1)*, or

(ii) by which a decision of the Government is published to the general public by or on behalf of the Government.

(3) Subject to the provisions of this Act, *subsection (1)* does not apply to a record referred to in that subsection

(*a*) if and in so far as it contains factual information relating to a decision of the Government that has been published to the general public, or

(*b*) if the record relates to a decision of the Government that was made more than 5 years before the receipt by the head concerned of the request under *section 7* concerned.

(4) A decision to grant a request under *section 7* in respect of a record to which *paragraph (a)* or *(b)* of *subsection (1)* applies shall not be made unless, in so far as it is practicable to do so, the head concerned has, prior to the making of the decision, consulted in relation to the request with

(*a*) the leader of each political party to which belonged a member of the Government that made any decision to which the record relates, and

(*b*) any member of the Government aforesaid who was not a member of a political party.

(5) Where a request under *section 7* relates to a record to which *subsection (1)* applies, or would, if the record existed, apply, and the head concerned is satisfied that the disclosure of the existence or non-existence of the record would be contrary to the public interest, he or she shall refuse to grant the request and shall not disclose to the requester concerned whether or not the record exists.

(6) In this section

"decision of the Government" includes the noting or approving by the Government of a record submitted to them;

"record" includes a preliminary or other draft of the whole or part of the material contained in the record;

"Government" includes a committee of the Government, that is to say, a committee appointed by the Government whose membership consists of

(*a*) members of the Government, or

(*b*) one or more members of the Government together with either or both of the following:

(i) one or more Ministers of State,

(ii) the Attorney General.

Proposed Amendments

Section 12 of the Bill, amongst other things, provides for the following amendments:

1. mandatory exemption of all Government records covered by substituting the words "shall refuse" for the words "may refuse" in subsection (1)
2. protection for communications between Ministers dealing with matters under consideration by the Government
3. substituting the word "primarily" for the word "solely" to allow for advice created for the primary purpose of Government business to be protected
4. extension of the period during which records covered under section 19(1) are protected from 5 years to 10 years
5. extending the protection available under 19(1) to records of "a committee of officials" where the committee is certified by the Secretary General to the Government as having been established for direct support of Government deliberations and will report directly to the Government. The amendment also includes a definition of the term "officials" which includes civil servants and special advisers.

MANDATORY EXEMPTION

In its Report to Government, the High Level Group stated that it was "satisfied that the overarching policy of section 19 is that Cabinet records should be exempt from access for a reasonable time and that it is necessary if the Cabinet process and the exercise of collective responsibility are not to be constrained to the detriment of effective decision making based upon the free and frank expression of views (and that) in these circumstances ... the legislation should give clear expression to the policy intent by removing the option of a discretion being exercised".

I note that in proposing this change, the High Level Group, referring to my Report *"The Freedom of Information Act - Compliance by Public Bodies"* stated that "the Information Commissioner has observed (that the exemption) has been applied largely in a mandatory fashion (and) ....that (this) has prompted calls by the Information Commissioner.....for greater flexibility in its application to allow access to Cabinet records in certain circumstances".

While I do not take issue with the sense of what the extract contained I feel that for the sake of clarity and completeness I should quote, in full, the relevant extract from my Report.

Section 19

"The section contains both mandatory and discretionary exemptions. The mandatory exemption is contained in section 19(2) and requires access to be refused to records (other than memoranda to Government and briefing material) which contain the whole or part of a statement made at a meeting of the Government or information that reveals, or from which may be inferred, the substance of the whole or part of such a statement. This provision is intended to be sufficiently narrow to be consistent with the decision in the case of Attorney General v. Hamilton on Cabinet confidentiality (see comments of sponsoring Minister in the Dáil : Dáil Debates Vol. 477, Col. 765).

The discretionary exemption is contained in section 19(1) and applies to other records

such as memoranda to Government and associated briefing material but with two exceptions. Access cannot be refused under section 19(1) to records which relate to a decision of the Government made more than five years earlier nor to records to the extent that they contain factual information about a published decision of the Government. Where discretion to refuse access does exist e.g. where the records relate to a decision of the Government and contain something other than factual information then, before exercising the discretion in favour of release, the decision maker is required to consult with the leader of each political party which participated in the Government which made the decision to which the record relates.

In practice, it appears that decision makers rarely, if ever, consider exercising their discretion to release. Nor have decision makers been provided with any guidance as to when it might be appropriate to exercise their discretion to release or how to go about the consultation process envisaged by the section where release is contemplated. This has led to a perception among some decision makers that the section 19 exemption is mandatory in its entirety. It has also resulted in situations in which decision makers appeared to feel obliged to refuse access to Government memoranda even though their contents had already been released in their entirety by way of press release.

I am concerned that an exemption which is clearly intended to be applied with discretion, is regarded, in practice, as mandatory. Further, the refusal of access to records whose contents are already largely in the public domain is not an encouragement to the creation of a more open public service. It appears to place the emphasis on finding the correct "technical" basis for refusal rather than making information available "to the greatest extent possible consistent with the public interest and the right to privacy". Such a minimalist approach can easily spill over into the use of other exemptions resulting in an overly cautious approach to the release of other information".

Comment

It is clear from this extract that my view of the intention of the Act as originally framed differs from that of the High Level Group.

SAMPLE CASES ON OTHER SECTION 19 AMENDMENTS

Mr. Mark Henry and the Department of the Taoiseach (98040)

Mr. Henry sought copies of all e-mail received or sent by the Taoiseach and two named officials of his Department on certain dates. The Department granted access to the requester to all but five of the records sought. The five records were: an agenda for a meeting of the Cabinet, a provisional time table of Government meetings, a record relating to a possible visit to Ireland of the President of the European Commission, and two records relating to visits abroad by the Taoiseach. The Department refused access to these records claiming exemption under section 19(1) for the first two records, section 20(1) and 22(1)(c)(ii)(I) for the third record and sections 20(1) and 24(1)(c) for the fourth and fifth records.

Decision

In so far as the decision relates to section 19 of the Act I found that the agenda for the Cabinet meeting was exempt under section 19(1)(c) as it contained information for use solely for the transaction of Government business at a meeting of the Government and decided that this record did not fall to be disclosed. I decided that access should be granted to the remaining relevant record in that disclosure of the list of provisional dates for Cabinet Meetings, which had been prepared for the Taoiseach's diary, did not amount to a disclosure of a Government record, within the meaning of section 19(1)(b), nor was the record prepared solely for the purpose of the transaction of any business of the Government at a meeting of the Government and that section 19(1)(c) did not apply.

Comment

It is unlikely that the status of these records would be affected by the proposed amendment. The replacement of the word "primarily" for the word "solely" would have implications for the release of the second record.

Ms. Eithne Fitzgerald and the Department of the Taoiseach (98127)

Amongst other things, Ms Fitzgerald requested a copy of a policy paper prepared for the Interdepartmental Strategy Group on Employment and Unemployment. Over the course of

the review the Department argued that the exemptions provided for in sections 19(1)(a) and 19(1)(b) applied.

In my decision I noted an important distinction between section 19(1)(a) and section 19(1)(c).

Decision

Section 19(1)(a)

In my decision I noted that section 19(1)(a) is concerned with the status of a record, i.e. was it submitted or will it in the future be submitted by a Minister or the Attorney-General to the Government for its consideration and was it created for that purpose. The normal category of records covered would be formal memoranda for Government including Aides Memoire. Needless to say many such memoranda are not prepared solely for the purpose of the transaction of any business of the Government at a meeting of the Government. While their dominant purpose may be to get a Government decision or to bring certain matters to the attention of Government for noting or approval as appropriate, such memoranda may also be used for other purposes after the conclusion of the meeting of the Government, for example, draft legislation.

As the review progressed the Department appeared to have accepted that this paper was not submitted to the Government by a Minister of the Government or the Attorney General and it did not pursue this claim in its second submission. Section 19(1)(a) can only apply to records submitted by a Minister of the Government or the Attorney General. In other words, the means by which the record is submitted to Government is of concern. The Department did not claim that the Strategic Group on Employment and Unemployment submitted the Background Paper to the Cabinet Committee through any Minister. It is obvious in the circumstances of this case that the exemption in section 19(1)(a) would have applied had the record been submitted to Government by a Minister, but this did not, in fact, occur. While the failure to submit the paper to the Government by a Minister of the Government or the Attorney General might seem a rather technical point, it was one which I could not ignore, given the clear wording of section 19(1)(a). I found that the Department was not entitled to rely upon section 19(1)(a) to refuse access.

Section 19(1)(c)

I noted further that section 19(1)(c) is concerned with the contents and use of records and, unlike section 19(1)(a) applies to records which are given to an individual member of Government for use by him or her solely for the purpose of transaction of the business of the Government at a meeting of the Government. I found that this category of records would clearly cover departmental briefing notes for individual ministers attending a Government meeting, and indeed, notes prepared for the Secretary to the Government or Assistant Secretary to the Government for the purposes of such a meeting. In my decision I referred to case number 98040 where I ruled that section 19(1)(c) applied to the agenda of a Government meeting. The sole reason for the creation of such records is to assist the Government in the conduct of one or more of its meetings and the record ceases to have a purposeful existence after the conclusion of the meeting.

The Department's claim for exemption was based on the premise that the information in this record was for use by the members of the Cabinet Sub-Committee solely for the purpose of transacting business at their meetings. I said that I could accept that, in many cases, the information in a document submitted to such a committee will be intended for use only at the meetings of the committee. This might be the case where, for example, the information was of a sensitive nature or where it contained discussions of future policy options. However, I did not believe that this was the case here. The Background Paper was prepared for the information of the Cabinet Sub-Committee and there was nothing either in its contents or in the circumstances of its preparation, to suggest that it was intended for use solely at meetings of the Sub-Committee. It seemed to me that, as an information paper, its purpose was to inform the members of the Sub-Committee for whatever purposes they thought fit and that its use could not be confined to the transacting of business of the Government at a meeting of the Government. Indeed, the very nature of the process described by the Department - involving future discussions and negotiations with the social partners - appeared to me to make it unlikely that the members of the Cabinet Sub-Committee would not make use of the information in subsequent discussions and negotiations.

Taking account of the type of information involved and the process as a whole, I did not accept that the sole use which members of the Cabinet Committee on Social Inclusion would make of this information would be the transacting of business at its meetings.

I found that the background paper was not submitted to the Government by a Minister of the Government or the Attorney General and that, therefore, the exemption in section 19(1)(a) did not apply.

While the paper was prepared for the information of the Cabinet Sub-Committee there was nothing, either in its contents or in the circumstances of its preparation, to suggest that it was intended for use solely at meetings of the Sub-Committee. As such, I found that the Department was not entitled to rely upon section 19(1)(c) to refuse access.

Comment
Had the 1997 Act been framed as is now proposed, it is possible that the amendments in relation to 3. and 5. under Proposed Amendments above would have had to be factored into my review in this case.

Phelim McAleer and the Department of Justice, Equality and Law Reform (98060)
Mr. McAleer sought records relating to the signature of the Brussels II convention on the recognition of matrimonial proceedings in EU states. The records at issue consisted of records received by the Department from the EU and related records created by Irish civil servants; a memorandum to the Government, internal correspondence about the memorandum and the actual Government decision.

The Department claimed exemptions under sections 24(1)(c) (international relations of the State), and section 19. I comment on the section 24(1)(c) aspect later in this report.

Decision
In so far as the decision referred to section 19 I found that the Department was entitled to refuse access to the non-factual elements of the memorandum to the Government under section 19(1)(a) but was not entitled to refuse access to the factual elements under section

19(3)(a). I decided that the Department was entitled to refuse access to the non-factual elements of a note for the Minister which contained information for a member of the Government (the Minister) for use by him solely for the purpose of the transaction of business of the Government at a meeting of the Government under section 19(1)(c) but was not entitled to refuse access to the other internal correspondence about the memorandum under section 19 (e.g. letters regarding the circulation of the memorandum, cover sheets for faxes, a note regarding time limits for submission of observations, proposals for scheduling the matter at a meeting of Government, internal memos seeking observations, correspondence between Departments on the memorandum).

I also decided that the Government decision contained factual information relating to a decision of the Government that has been published to the general public and that the Department was not entitled to refuse access under section 19(1).

Comment

It is possible that the release of some records similar to those described in relation to internal correspondence would be affected by the proposed amendment.

Mr. Pat Leahy and the Department of Justice, Equality and Law Reform (99450)

Mr. Leahy sought records relating to the decision to relocate the Legal Aid Board to Cahirciveen. In response to his request the Department decided to release all correspondence apart from one letter and parts of some and all of other records relating to the Government decision (draft memorandum for Government, draft observations from the Department of Finance, final observations from the Department of Finance).

Decision

In my decision I was satisfied that two draft memoranda for Government were earlier drafts of a final memorandum submitted by the Minister for Justice, Equality and Law Reform to the Government for its consideration and that the record was created for that purpose. I also decided that observations from the Department of Finance, which were in draft and final form, constituted "a preliminary or other draft of the whole or part of the material" contained in the final memorandum for Government (section 19(6) refers). To explain my decision in

relation to the observations, I referred to the Cabinet Handbook, which contains, among other things, instructions for the preparation and submission of memoranda for Government.

Comment

These records were exempt under the Act as originally framed and it is unlikely that the proposed amendment would affect their status in this regard.

Mr. Paddy Prendiville and the Department of Foreign Affairs (99179)

This decision related to a request for access to records relating to the decision to participate in the Partnership for Peace (PfP).

I refer in greater detail to this review under my comments on section 24 of the Act. In so far as the review was relevant to section 19 the Department invoked section 19(1)(a) of the FOI Act in relation to records which consist of an Aide Memoire for Government and a supplement that was also prepared for Government. Having examined these records in conjunction with another record, which included advice to the Minister for Foreign Affairs on how to proceed on the issue of PfP participation, I was satisfied that they were in fact submitted to the Government by the Minister for its consideration and were created for that purpose. I accepted that, where these records consisted of a mixture of opinion, interpretation, and proposal, the Department was entitled to refuse access to this information under section 19(1)(a). I found that those portions of the records that contained factual information relating to the decision of the Government to participate in the PfP, which has now been published, or made known, to the general public, were not exempt under section 19(3) of the Act.

Comment

The status of the records declared exempt under the Act as originally framed is unlikely to be affected by the proposed amendment.

Mr. ABC and the Department of Environment and Local Government (020277)

Mr. ABC submitted a request to the Department for "any information relating to the cost of installing underground electricity cables as against the erection of overhead electricity pylons". The Department identified two records coming within the scope of the request and

refused access to one "Appendix 4- Underground Issues Paper". The Department explained, in its original decision, that the record at issue was part of a submission of the Cross-Departmental Team on Infrastructure and Public-Private Partnerships to a meeting of the Cabinet Sub-Committee on Infrastructure and Public-Private Partnership. The Department originally refused access to the record pursuant to the provisions of section 19(1)(b) of the FOI Act. In its decision on internal review, however, it refused access pursuant to the provisions of section 19(1)(a). Following further correspondence with my Office, the Department also claimed that the provisions of section 19(1)(c) applied to the record.

Section 19(1)(a)

The Department argued that the report and appendices were prepared by the Department of Finance and submitted to the Cabinet Committee by the Minister for Finance for the purpose of transacting business at a meeting of the Cabinet Committee. I noted, however, that the Department held a copy of appendix 4 only and that it did not hold a copy of the actual report.

As the review progressed it became apparent that the Appendix had been prepared for a sub-group of the Cross-Departmental Team to obtain a greater understanding of the issues relating to electricity infrastructure as opposed to having been created for the purpose of its submission to the Government for their consideration by a Minister of the Government or the Attorney General. In the circumstances, I found that the Department was not entitled to rely upon section 19(1)(a) to refuse access.

19(1)(c)

In this case, there was nothing either in the contents of the record at issue or in the circumstances of its preparation to suggest that it was intended solely for use at a meeting of the Cabinet Committee. As I have indicated above, it seems to me that the purpose of the creation of the record was to allow for the Legal Issues Group to obtain a greater understanding of the issues relating to electricity infrastructure which would, in turn, assist the group in achieving its objectives. I found, therefore, that the Department was not entitled to rely upon section 19(1)(c) to refuse access.

Comment

Depending on the circumstances of the establishment of inter-Departmental sub-groups, the amendment in relation to "a committee of officials" above could have a bearing on similar records in the future.

SECTION 20

Section 20 provides:

20.-(1) A head may refuse to grant a request under section 7-

(a) if the record concerned contains matter relating to the deliberative processes of the public body concerned (including opinions, advice, recommendations, and the results of consultations, considered by the body, the head of the body, or a member of the body or of the staff of the body for the purpose of those processes), and

(b) the granting of the request would, in the opinion of the head, be contrary to the public interest,

and, without prejudice to the generality of paragraph (b), the head shall, in determining whether to grant or refuse to grant the request, consider whether the grant thereof would be contrary to the public interest by reason of the fact that the requester concerned would thereby become aware of a significant decision that the body proposes to make.

(2) Subsection (1) does not apply to a record if and in so far as it contains

(a) matter used, or intended to be used, by a public body for the purpose of making decisions, determinations or recommendations referred to in section 16,

(b) factual (including statistical) information and analyses thereof,

(c) the reasons for the making of a decision by a public body,

(d) a report of an investigation or analysis of the performance, efficiency or effectiveness of a public body in relation to the functions generally or a particular function of the body,

(e) a report, study or analysis of a scientific or technical expert relating to the subject of his or her expertise or a report containing opinions or advice of such an expert and not being a report used or commissioned for the purposes of a decision of a

public body made pursuant to any enactment or scheme.

Proposed Amendments

Section 13 of the Bill provides for the following amendments:

1. The amendment of 20(1)(a) to extend the protection available for matter relating to the deliberative processes to those of "a public body" as opposed to "the public body concerned".
2. Insertion of subsection 1A which would require a public body to refuse a request for a record if a Secretary General of a Department of State has certified that the record contains matter relating to the deliberative processes of a Department of State. Such a Certificate must be revoked by a Secretary General once the deliberative processes concerned have ended. While such a Certificate is in force, a requester would not be entitled to apply for an internal review or for a review by the Information Commissioner of the decision to refuse a request.
3. The amendment of subsection 20(2)(b) as a consequence of the inclusion of the definition in section 2 of "factual information".
4. The inclusion of a public interest balancing test which would require that a request be granted in cases where the public interest would, on balance, be better served by granting than by refusing the request and the removal of the current requirement, at section 20(1)(b), that the granting of a request would be contrary to the public interest.

SAMPLE CASES

Ms Eithne Fitzgerald and the Department of the Taoiseach (98127)

Ms Fitzgerald requested copies of minutes and a policy paper prepared for the Interdepartmental Strategy Group on Employment and Unemployment. Access was refused on the grounds that the records contained matters relating to the deliberative processes of the Department within the meaning of section 20 and that the deliberative process was ongoing. It was also claimed that section 19(1) applied to one record, a Background Paper on Unemployment prepared for the Cabinet Committee on Social Inclusion by the Strategy Group. The Background Paper was prepared for the Cabinet Committee on Social Inclusion by the Strategy Group on Employment and Unemployment. I have already commented on the section 19 aspect earlier in this report.

Decision

I noted that the Background Paper contained factual information and that section 20(2)(b) provides that subsection (1) does not apply to a record if and in so far as it contains "factual (including statistical) information and analyses thereof,...". As a preliminary point, I considered whether the Background Paper was part of the deliberative processes of the Department of the Taoiseach as the public body concerned with the request. While I did not accept the Department's contention that the interpretation of "public body" should be read as wider than the Department itself, I accepted that the Background Paper contained matter relating to the Department's deliberative process in that the Department considered the paper for the purpose of deciding on its input into policy and strategy in relation to unemployment. I also accepted that this process was ongoing and that final decisions as a result of these deliberations had not yet been made.

I noted, however, that for the exemption to apply, two requirements must be met. The first is that the record must contain matter relating to the deliberative process; the second is that disclosure must be contrary to the public interest. I did not accept the view put forward by the Department that "as a principle, the [deliberative] process, until completed, should be given full protection and that is the purpose of section 20". I further noted that the exemption must be applied and the public interest considered having regard to the contents of the record or records at issue in each particular case.

The Department identified a number of general factors which it felt would render the granting of the request contrary to the public interest, viz.

- that the disclosure of the material would inhibit the development of a co-ordinated position on these policy matters across Government Departments and agencies,
- that the disclosure of the material could prejudice the Government's position vis-à-vis discussions and negotiations with the social partners and that the release of the Background Paper would put into the public domain information on strategies which the Government might adopt in negotiating the successor to the Partnership 2000 Agreement and would prejudice those negotiations,

- that the paper contained proposals for strategies and policies which had not yet been agreed and that the premature release of information about these sensitive deliberations would be contrary to the public interest.

The Department contended that the process relied upon the willingness of participants to contribute in an open and frank manner and that early disclosure of the deliberations would prejudice the willingness of participants to contribute in this free fashion. This would in turn inhibit the development of a co-ordinated position. I did not accept this as a factor against the release of the information. I noted that the FOI Act has introduced a new regime in respect of records held by public bodies and while I accepted that open and frank discussion is often required in order to evaluate and assess policy options, I did not accept as a general proposition that the Act would have the effect of preventing public servants from properly carrying out their functions. I found that the record was in the nature of an information paper and that while it undoubtedly dealt with a matter of public importance, there was nothing in it which I could imagine its authors would have omitted if they had known from the outset that it would have been the subject of a request under the FOI Act.

I rejected the Department's argument that the release of the Background Paper would put into the public domain information on strategies which the Government might have adopted in negotiating the successor to the Partnership 2000 Agreement. Thirdly, I found that even if I were to accept that the concept of "premature" release was a valid one, the Department did not explain how such release could be contrary to the public interest. I found that, having regard to the facts of the case, the Department was not entitled to rely upon section 20(1) to refuse access to the Paper. For the same reasons I found that the Department was not entitled to rely on section 20(1) to refuse access to the non-factual elements of the minutes of the meetings of the Strategy Group on Employment and Unemployment.

Comment

Had the 1997 Act been framed as now proposed, it would have been sufficient for the Department to have shown that the Background Paper was part of the deliberative processes of a public body as opposed to having been part of the deliberative processes of the public body concerned with the request. While some further clarification would be desirable it

seems that this amendment is designed to enable greater co-ordination or perhaps centralisation of decision making across the public sector. Secondly, had the Secretary General of the Department been in a position to certify that the records at issue related to an ongoing deliberative process, I would not have been in a position to review the matter. Finally, rather than having to satisfy me that the release of the records would be contrary to the public interest, the Department would only have been required to satisfy me that the public interest would, on balance, be better served by refusing the request.

Mr John Burns and the Department of Education and Science (98099)

Mr Burns sought from the Department of Education and Science, amongst other things, copies of Whole School Evaluation (WSE) reports created during a pilot project. The Department refused access to the reports pursuant to the provisions of section 20(1) and 26(1)(a) of the FOI Act.

Decision

I accepted that the WSE reports contained matter relating to the deliberative process of the Department. The reports were part of a pilot project. The Department made it clear that part of the purpose of the pilot project was to refine the process of whole school evaluation and that changes had been made through the different phases of the pilot project.

On the matter of whether release would be contrary to the public interest I accepted that the voluntary participation of schools in pilot projects such as this is in the public interest and that it is in the public interest that participants feel able to take risks at the pilot phase of a project. I found that the release of the WSE reports would threaten the voluntary participation and reduce the willingness to take risks during pilot phases of projects.

Mr Burns requested that I consider the applicability of sections 20(2)(d) and (e) to the reports. These sections provide that section 20(1) does not apply to a record if and in so far as it contains (d) "a report of an investigation or analysis of the performance, efficiency or effectiveness of a public body in relation to the functions generally or a particular function of the body", or (e) "a report, study or analysis of a scientific or technical expert relating to the subject of his or her expertise or a report containing opinions or advice of such an expert and

not being a report used or commissioned for the purposes of a decision of a public body made pursuant to any enactment or scheme".

I found that section 20(2)(d) was not relevant as the reports were analyses of the performance of individual schools and schools were not prescribed as public bodies for the purposes of the FOI Act. I also found that section 20(2)(e) was not relevant since the inspectors who prepared the reports were not scientific or technical experts but rather qualified staff of the Department whose functions included the offering of their opinions and advice in relation to the performance of schools. I found, however, that the Department was not entitled to rely on section 20(1) to refuse access to certain factual elements of the reports concerning school profile, accommodation and resources, pursuant to the provisions of section 20(2)(b).

Comment

Had the Secretary General of the Department been in a position to certify that the records at issue related to an ongoing deliberative process, I would not have been in a position to review the matter. Furthermore, rather than having to satisfy me that the release of the records would be contrary to the public interest, the Department would only have been required to satisfy me that the public interest would, on balance, be better served by refusing the request. However, as I found that the release of the records would be contrary to the public interest which is a stronger test than the public interest balancing test proposed, this would not have affected my decision.

Mr Mark Henry and the Department of the Taoiseach (98040)

Mr Henry of Policywatch sought from the Department of the Taoiseach copies of all e-mail received or sent by the Taoiseach and two named officials of his Department on certain dates in April 1998. The requester was granted access to all of the records sought with the exception of five. One of the records, which referred to a possible forthcoming visit to Ireland by the President of the European Commission and contained advice for the Clerk of the Seanad, was refused under sections 20(1) and 22(1)(c)(ii)(I) of the Act. Two other records, relating to the preparation of a schedule of the Taoiseach's visits abroad, were refused under sections 20(1) and 24(1)(c) of the Act.

Decision

Having examined the record relating to a possible forthcoming visit to Ireland by the President of the European Commission, I found that it did not contain matters relating to the deliberative processes of the Department. It contained no discussions, opinions or advice on the merits or otherwise of the proposed visit or proposed itinerary. It was concerned solely with the making of administrative arrangements in relation to the visit of the President.

One of the records relating to the preparation of a schedule of the Taoiseach's visits abroad was an e-mail regarding the Taoiseach's (then) proposed visit to China. At the time of my decision the visit had taken place but the Department declined to agree to its release. I accepted that an argument might be made that the record contained matters relating to the deliberative processes of the Department in that it contained a very brief discussion of the relative merits of using the Government jet or using commercial public transport for the visit. I noted that, even allowing this point, the Department had not offered any specific argument in support of the view that it would be contrary to the public interest to release the record. Having examined the record, I concluded that it would not be contrary to the public interest to release it.

The third record was an e-mail containing the Taoiseach's programme of foreign engagements for 1998. I found that the section 20(1) exemption did not apply where the visits/meetings had taken place as there were no ongoing deliberations that could be affected by the release of the information. I found that section 20(1) did not apply where future visits/meetings listed in the programme had not yet taken place but had been confirmed as the deliberations had ended and the decision had been made. I found that section 20(1) did not apply where visits/meetings which were due to take place did not occur as the deliberations had ended and the decision had been made. Finally, in relation to visits/meetings which were provisional and had not yet been confirmed, I accepted that a deliberative process of some kind may be ongoing, but I found no matter of a deliberative nature in the record at issue. I concluded that the Department was not entitled to rely on section 20(1) to refuse access.

Comment

Had the Secretary General of the Department been in a position to certify that the records at

issue related to an ongoing deliberative process, I would not have been in a position to review the matter.

Mr X and the Pensions Board (000276)

The requester sought from the Pensions Board a copy of the Board's Report to the Minister for Social, Community and Family Affairs concerning a Pensions Ombudsman. The Board withheld certain parts of the Report pursuant to the provisions of section 20(1) of the FOI Act.

Decision

I accepted that the parts of the Report to which access was refused contained matter relating to the deliberative processes of the Board. On the question of whether release of the information was contrary to the public interest, the Board identified the following specific harms which might flow from release.

- The Board's Report was one of a number of reports prepared for the Minister's consideration in the context of the forthcoming Pensions Bill. The Board had, in addition to its Report "Securing Retirement Income" published in May, 1998, prepared reports on 17 other topics, including the Pensions Ombudsman. A further report on another issue was, at the time, yet to be finalised. The Board considered that to open up any of the individual reports to public scrutiny at this stage would create an expectation as regards the contents of the Pensions Bill, an expectation that might not be fulfilled. It argued that this could lead to a less than wholehearted welcome for the Bill, thereby jeopardising the Minister's objectives in this area.
- All of the reports were inter-linked and needed to be considered in their totality. The Bill, which had not yet been published, would represent a package of inter-related measures. It would be contrary to the public interest if focus on one particular report, released earlier than others, should create an imbalance in consideration of the other reports. Premature release of a report could prejudice the participation/views of affected stake-holders. The publication of the Bill could be delayed which would be harmful to the public interest in that the Programme for Prosperity and Fairness promised the new Pensions Bill by July 2000.

The Board contended that there would be ample opportunity for public debate when the legislative proposals were published as at that stage, public debate could take place in the context of the Bill as a package of measures intended to meet the stated objectives. The Board indicated that it intended to make all of its reports to the Minister publicly available at that stage.

I considered that the view of the public interest which the Board had taken in this case was rather narrow and that consideration had not been given to the wider public interest in releasing such records as the Report. I considered the argument that the release of an individual Report would create an expectation as regards the contents of the Pensions Bill which, if not fulfilled, could lead to a less than wholehearted welcome for the Bill, appeared too hypothetical to accept as a sound basis for exemption of the material. I considered that the fact that the public may know that certain recommendations have been made to the Minister by the Pensions Board and may be able, when the Bill is published, to identify what recommendations had been accepted or rejected can hardly be held to be contrary to the public interest.

I did not accept the Board's argument that the Report was one of many which were all inter-linked and needed to be considered and viewed in their totality to achieve a rounded perspective on the various recommendations and how these were reached. I noted that the Report was a record for the purposes of the Act and indeed was a self contained report dealing comprehensively with its subject matter. I did not see how it would be contrary to the public interest to release the Report. I considered that, in maintaining these arguments, the Board was not doing justice either to the objectivity of the policy-makers of the Department or to the ability of the affected stake-holders to place the Report in context.

I found that the argument that the Bill might be delayed was not satisfactorily explained. While I accepted that it was possible that release of the Report might give rise to further debate and even inconvenience for the Department, I did not accept that the release of the Report would, of itself, necessarily cause delay to the introduction of the Pensions Bill. I found that the Board was not entitled to rely on section 20(1) of the Act to refuse access to the

report.

Comment

Rather than having to satisfy me that the release of the record would be contrary to the public interest, the Board would, under the amended provisions, only have been required to satisfy me that the public interest would, on balance, be better served by refusing the request. A Secretary General (most likely in the Department of Social and Family Affairs) could also have prevented my reviewing the case by issuing a Certificate.

SECTIONS 21 (1) (a) AND SECTIONS 21 (1) (b)

Sections 21 (1) (a) and 21 (1) (b) as currently framed state:

> **21.**(1) A head may refuse to grant a request under *section 7* if access to the record concerned could, in the opinion of the head, reasonably be expected to -
>
> (*a*) prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by or on behalf of the public body concerned or the procedures or methods employed for the conduct thereof,
>
> (*b*) have a significant, adverse effect on the performance by the body of any of its functions relating to management (including industrial relations and management of its staff),

Proposed Amendments

The sections are to be amended by providing a revised wording for paragraphs (a) and (b) to the effect that the Principal Act will extend the protection available to any public body, not just the public body the subject of the request.

Comment

My comments in relation to the similar amendment proposed under section 20 (1) (a) also apply in this case.

SECTION 22

Section 15 of the Bill inserts a new subsection in section 22 of the Act and will provide a new exemption for records relating to tribunals and other bodies appointed to inquire into

specified matters. Section 46(1)(a)(ii) of the Act currently excludes from the operation of the Act certain records held by tribunals and it provides as follows:

> **46**(1) This Act does not apply to
>
> (*a*) a record held by ....
>
> (ii) a tribunal to which the Tribunals of Inquiry (Evidence) Act, 1921, is applied, ...
>
> and relating to, or to proceedings in, ... such a tribunal other than
>
> (I) a record that relates to proceedings in ... such a tribunal held in public but was not created by the ... tribunal and whose disclosure to the general public is not prohibited by .... the tribunal, or
>
> (II) a record relating to the general administration of .... such a tribunal or any offices of such a tribunal,

Proposed Amendment

Section 15 of the Bill provides a new mandatory exemption for records held by a public body relating to the work of a tribunal or inquiry (as defined) including preparatory work related to their establishment.

SAMPLE CASES

In one case which came before me but was subsequently withdrawn, the requester sought

access to records which were found to include records which the public body decided were records of a Tribunal and which it claimed were excluded from the provisions of the FOI Act pursuant to section 46(1)(a)(ii). The records related to the purchase of fixed assets (e.g. hotocopying machine for the Tribunal). A record relating to the general administration of tribunals is not excluded from the Act. It was argued, inter alia, that the records were record of a Tribunal, the originals of which were in the possession of a public body solely for a particular purpose. It was argued that correspondence whether sent or received by the Tribunal is a record held by a Tribunal, that the records were originals held by the public body as an agent of the Tribunal and that a copy of a record held by an agency other than a Tribunal does not alter the fact that it is a record held by a Tribunal. As the request was withdrawn, it was not necessary for me to make a formal decision in this case. However, my approach to date has been that documents forwarded to public bodies which are subject to the FOI Act, are documents held by the receiving body.

Comment

The existing exclusion is limited to records held by tribunals to which the 1921 Act applies. The proposed amendment is not limited to records of these tribunals. The proposed amendment will apply regardless of which public body holds the records. It will also apply to records which relate to the appointment, or proposed appointment of, or business or proceedings of tribunals or bodies appointed to inquire into specified matters. In this regard, the interpretation and application of the words "relate to" as referred to earlier is very broad.

SECTION 23

Section 16 of the Bill proposes an amendment in section 23 of the Act to provide additional grounds for exemption where release of a record could reasonably be expected to "endanger the life or safety of any person".

Comment

To date, issues of personal safety have arisen in only a very small number of cases which have come before me for review. However, where this issue does arise, it is a very serious matter as it would be quite unacceptable that the FOI Act should have the effect of putting anyone's personal safety at risk. The perceived risk may relate to the requester, to staff of the public body concerned or to third parties (usually family, friends or neighbours of the requester). In some cases, the risk may be one of damage to property of an individual or organisation. The FOI Act, at present, does not have an explicit exemption designed to protect personal safety or to protect property.

In my Annual Report for 2001 I discussed the personal safety issue and undertook to consider the matter further. On 3 February 2003 I published a discussion document on this issue (available on my Office website) which considered a number of typical risk scenarios as well as a number of possible options already provided for in section 23 and in section 28(3). The discussion document concludes:

"It is clear the FOI Act, while not having a specific exemption to ensure the personal safety of third parties or their property, does have a number of provisions which might be invoked to achieve the same purpose. Ultimately, a specific "personal safety" exemption might be useful; but even with such a provision, it remains the case that informing the requester that such a provision (or one of the section 23 options outlined above) is being invoked creates difficulties. This is because the requester will be put on notice that some people are in fear of him/her. Finding a solution to this dilemma will require considerable further thought."

Comment

It would be counter-productive to draw attention to any particular review case in which the question of personal safety, or risk to property, has been at issue. I am aware, however, from these cases that the revelation in a decision of fears that the requester may inflict violence, or cause damage to property, may be as damaging as the release of the records in question. Where this is the case, explicit reliance on a personal safety exemption may not be the best option.

SECTION 24 (as qualified by Section 25)

Section 24, as amended, provides as follows:

24.- (1) A head may refuse to grant a request under *section 7* in relation to a record (and, in particular, but without prejudice to the generality otherwise of this subsection, to a record to which *subsection (2)* applies) if, in the opinion of the head, access to it could reasonably be expected to affect adversely -

(*a*) the security of the State,

(*b*) the defence of the State,

(*c*) the international relations of the State,

(*d*) matters relating to Northern Ireland, or

(e) matters relating to the functions of the Independent Commission for the Location of Victims' remains (within the meaning of the Criminal Justice (Location of remains) Act, 1999).

(2) This subsection applies to a record that -

(*a*) contains information -

(ii) that was obtained or prepared for the purpose of intelligence in respect of

the security or defence of the State, or

(ii) that relates to -

(I) the tactics, strategy or operations of the Defence Forces in or outside the State, or

(II) the detection, prevention, or suppression of activities calculated or tending to undermine the public order or the authority of the State (which expression has the same meaning as in section 2 of the Offences against the State Act, 1939), or

(III) the functions of the Commission referred to in subsection (1)(e),

(*b*) contains a communication between a Minister of the Government and a diplomatic mission or consular post in the State or a communication between the Government or a person acting on behalf of the Government and another government or a person acting on behalf of another government,

(*c*) contains a communication between a Minister of the Government and a diplomatic mission or consular post of the State,

(*d*) contains information communicated in confidence to any person in or outside the State from any person in or outside the State and relating to a matter referred to in *subsection (1)* or to the protection of human rights and expressed by the latter person to be confidential or to be communicated in confidence,

(*e*) contains information communicated in confidence from, to or within an international organisation of states or a subsidiary organ of such an organisation or an institution or body of the European Union or relates to negotiations between the State and such an organisation, organ, institution or body or within or in relation to such an organisation, organ, institution or body, or

(*f*) is a record of an organisation, organ, institution or body referred to in *paragraph (e*) containing information the disclosure of which is prohibited by the organisation, organ, institution or body.

(3) Where a request under *section 7* relates to a record to which *subsection (1)* applies, or would, if the record, existed, apply, and the head concerned is satisfied that the disclosure of the existence or non-existence of the record would prejudice a matter referred to in that subsection, he or she shall refuse to grant the request and shall not disclose to the requester concerned whether or not the record exists.

Section 25 provides that the Minister may declare, in a Certificate issued by him or her, that a record is, by virtue of section 23 or 24, an exempt record where he or she is satisfied that the record is of sufficient sensitivity or seriousness to justify his or her doing so.

Proposed Amendments

Section 24(2) currently provides specific examples of the types of records which may be covered by the exemption in 24(1). It is not sufficient, however, for the public body to show merely that the record is a type which comes within the scope of section 24(2). It must also satisfy me that the disclosure of the record could reasonably be expected to affect adversely one or more of the functions identified in section 24(1).

Section 17 of the Bill provides for the amendment of subsections (1) and (2) to provide a mandatory class exemption for the records specified in subsection (2) and eliminates the need for the identification of a specific harm which might arise from their disclosure.

SAMPLE CASES

Mr Phelim McAleer of the Sunday Times newspaper and the Department of Justice, Equality and Law Reform (98060)

Mr. McAleer sought records relating to the signing of the Brussels II convention on the recognition of matrimonial proceedings in EU states. The records at issue consisted of records received by the Department from the EU: and related records created by Irish civil servants; a memorandum to the Government, internal correspondence about the memorandum and the actual Government decision.

The Department claimed exemptions under sections 24(1)(c) (international relations of the State) and section 19.

Decision

A number of the records at issue were records of the Council of the European Union. The Department suggested that there was a principle that access to Council documents can only be granted in accordance with Council decisions and that this principle cannot be disregarded. It also argued that the threat of possible release under national access rules could affect international relations.

I found that the EU Code of Conduct did not purport to override the laws of the various member states relating to access to records held by government agencies in those states and that its provisions did not prevent the release of records received from the Council in the hands of Irish public bodies. I accepted that a number of the records were of a type described in section 24(2)(e) of the FOI Act, viz. records containing "information communicated in confidence from, to or within an international organisation of states or a subsidiary organ of such an organisation or an institution or body of the European Union or relates to negotiations between the State and such an organisation, organ, institution or body or within or in relation to such an organisation, organ, institution or body, ...". The records , which were all created after the commencement of the FOI Act, 21 April 1998, contained details of discussions between national experts working together to finalise the drafting of the Brussels II Convention and Protocol. I noted that the Council had already reached political agreement on the Convention in December 1997 and it was clear that the work undertaken by the national experts after 1997 was not concerned with matters which were then the subject of controversy at a political level, nor could it be said that the discussions in themselves were particularly contentious.

On the basis of the evidence before me, I was unable to accept that there was some common understanding between the member States which forbids the release of the records and the breach of which would adversely affect the international relations of the State. On this point, I noted that the only view expressed by the Council in consultations with my Office was that it could not interfere with national procedures. I understood this to be an acceptance that individual Member States of the EU have their own access to information laws which may overlap with the access rules of the EU in the sense that documents held by the Council may become the subject of access requests made under the rules of the EU, while copies of such documents held in a Member State may become the subject of access requests under the laws of the relevant State. I found that the records were not exempt by virtue of section 24(1)(c) of the FOI Act.

Comment

Had the 1997 Act been framed as now proposed, the records which I accepted to be of a type described in section 24(2)(e) of the FOI Act would be exempt from release as a class.

Mr X and the Department of Foreign Affairs (99580)

In Case No. 99580, the applicant sought from the Department of Foreign Affairs records relating to the Church of Scientology. The Department decided that to disclose the existence or non-existence of records relating to the request could reasonably be expected to adversely affect the international relations of the State.

Decision

I found that to acknowledge to the applicant the existence of records which come within the scope of his request is merely an acknowledgement that the Department holds records concerning the Church of Scientology. I found that the Department had not shown how such an acknowledgement could reasonably be expected to give rise to the harm identified and that the use of the "neither confirm nor deny" provision contained in section 24(3) was inappropriate. On the substantive issue of whether the disclosure of the records could reasonably be expect to affect adversely the international relations of the State, the Department's arguments concerned not only how disclosure of the contents of the records might give rise to the harm identified but also how disclosure of the nature and circumstances of the creation of the records might do so.

In determining whether access "could reasonably be expected to affect adversely ... the international relations of the State", I take the view that there must be real and substantial grounds for any such expectation at the time the decision to refuse access is made. The mere possibility of some adverse effect on international relations is not sufficient. I noted that the records in this case contained details, as reported by an Irish Embassy, of a foreign Government's views on the Scientology movement and of actions taken by that Government concerning the movement and that the majority of the information contained in the records was already in the public domain. I considered that the Department was, in effect, arguing for the protection of political reports such as those at issue as a class. Having regard to the contents of the records, I found that the Department had not shown, to my satisfaction, that the release of the records could reasonably be expected to affect adversely the international relations of the State.

Comment

As I did not consider the records to be of a type which come within the scope of section 24(2) the amendment to section 24 as proposed would not have affected my decision in this case.

Mr X and the Department of Justice, Equality and Law Reform (99078)

In Case No. 99078, the Department of Justice, Equality & Law Reform refused a request for access to security clearance records relating to the applicant. The Department claimed exemption on the basis of a number of exemptions, including section 24(1)(a), which protects records where access could reasonably be expected to adversely affect the security of the state.

Decision

During the course of my review, the Department gave a number of examples of how releasing records relating to security clearances such as those at issue in this case could adversely affect the security of the State. However, it did not, in my view, show that these adverse effects could flow from the release of the particular records which the applicant was seeking.

While I accept completely that there will be occasions where the release of records relating to security clearances could reasonably be expected to adversely affect the security of the State, I found in this case that the Department had not shown that the adverse effects which it identified in its submissions could reasonably be expected to flow from the release of the particular records which the applicant requested. I directed that the records be released.

(Note on this case: This decision was appealed to the High Court by the Minister for Justice, Equality & Law Reform. At the time of compiling this commentary, the High Court has not yet heard this appeal. The Minister did not, as he could have, issue a Certificate.)

Comment

Had the 1997 Act been framed as now proposed I would have had to consider any argument that the records at issue were of a type which came within the scope of section 24(2) and had I so found, the records would have been exempt from release, irrespective of whether there were any adverse effects on the security of the State.

Mr X and the Department of Foreign Affairs (98190)

In Case No. 98190, the applicant sought from the Department of Foreign affairs access to a list of file titles and numbers of files held in the Department's Anglo-Irish Division.

Decision

The Department identified a potential adverse effect on matters relating to Northern Ireland which could arise as a result of the disclosure of details of file titles related to particular activities carried out by the Department, viz. a potential risk to some officials of the Department who deal with matters relating to Northern Ireland. I was satisfied that the Department was justified in concluding that the potential risk identified could reasonably be expected to materialise as a consequence of disclosing the file titles in question.

Comment

The proposed amendment would have no significance insofar as I decided that the records were exempt by virtue of section 24(1)(d).

Mr Paddy Prendiville and the Department of Foreign Affairs (99179)

Mr Prendiville sought from the Department of Foreign affairs records relating to the decision to participate in the Partnership for Peace (PfP).

Decision

While I did not uphold the Department's claim for exemption pursuant to the provisions of section 24(1) in respect of all the records at issue, I accepted that adequate grounds existed for concluding that some of the material, if released, could have adverse effect on the international relations of the State. The material concerned included

- candid and descriptive discussions of developments in Europe which, in the Department's view, favoured participation in the PfP,
- a comment which purported to describe the view of certain other European countries of their position within the EU
- a note of a telephone conversation between an official of the Department and the Finnish

Security Director, the contents of which were sensitive,

- certain parts of correspondence between the Irish Embassy in Brussels to the Department regarding staffing at the Embassy and office accommodation at NATO Headquarters, which provided information about the resources available to deal with the various responsibilities of the Embassy and information about the resources of the Embassies of three other non-NATO EU members and
- a report of a confidential conversation between an Embassy official and an official at NATO Headquarters that gives details about the office configurations at the Manfred Woerner Building in Brussels.

I also accepted that five of the records at issue in this case were of a type described in section 24(2)(b) of the FOI Act, viz. records containing "a communication between a Minister of the Government and a diplomatic mission or consular post in the State or a communication between the Government or a person acting on behalf of the Government and another government or person acting on behalf of another government". Two of the records were reports of high-level, face-to face talks between the Taoiseach and the former United States Secretary of State and his counterpart in the Netherlands. It was apparent from the frank and candid nature of the talks that they were held on an understanding of confidentiality and I accepted that the international community expects communications of this nature to remain confidential. I was satisfied that the release of these records could reasonably be expected to have a deterrent effect on diplomatic communications of this nature and thus to impair the conduct of international relations.

I saw nothing sensitive, however, about the contents of the other three records which referred to an event to which the Irish Ambassador in Brussels had been invited by the Prime Minister of Slovenia. I found no reason to believe that the Slovenian Government or the international community in general would expect correspondence of this nature to be accorded confidential treatment indefinitely. I noted that one of the records even included an attachment that was specifically marked as "unclassified". I found that section 24(1) did not apply to the records, with the exception of a hand-written annotation to two of the records.

Comment

Had the 1997 Act been framed as now proposed, the records which I accepted to be of a type described in section 24(2)(b) of the FOI Act would be exempt from release as a class.

SECTION 26(1)(a)

Section 19 of the Bill amends section 26(1)(a) of the Act which as currently framed, states:

> **26**(1) Subject to the provisions of this section, a head shall refuse to grant a request under *section 7* if
>
> (*a*) the record concerned contains information given to the public body concerned in confidence .....

Proposed Amendment

Section 19 provides for the following amendment:

> the words "to a public body" will be substituted for the words "the public body concerned". Thus the exemption will apply where the information which was given in confidence has been given to *a* public body in confidence, but not necessarily to the particular public body holding the records of that information.

A similar amendment is proposed with regard to sections 20 and 21 of the Principal Act. I refer to my comments in relation to those sections above.

SAMPLE CASES

Ms Fiona McHugh, Sunday Times and the Department of Enterprise, Trade and Employment (98100)

The records in this case included records prepared by a number of State agencies in the course of the operation by the Department of an early warning system in relation to firms where job losses might occur. The records contained details of companies, the number of jobs which were at risk and details of the circumstances giving rise to the possible job losses.

Decision

I accepted that much of the information in the records was supplied by companies in confidence to the agencies and that the companies concerned expected that the matters revealed by them would not be disclosed to the public at large. I also accepted that

experience had proved that the major problem in detecting companies in difficulty is the reluctance of such companies to let this be know to outsiders. Thus, I accepted that if such material were released under the FOI Act, then some companies would not supply the information to the agencies and that, as a consequence, the Department's ability to obtain the information would be prejudiced. I found that the provisions of section 26(1)(a) had been met in relation to some of the records in this case.

Comment

The particular agencies which supplied the information to the Department were not public bodies for the purposes of the Act at that time. However, it is clear that confidential information which has been received by one body and passed from that body to another (public) body is still capable, in certain circumstances, of being protected under section 26(1)(a) by reason of the content of the information and the circumstances of in which it was passed.

SECTIONS 26, 27 and 28

Proposed Amendments

Section 19 of the Bill provides for the amendment of section 26 (relating to information received in confidence) to allow a head to refuse to confirm or deny the existence of record if the record is covered by the exemption in section 26(1)(a), where the acknowledgement of the existence or non-existence of the record could undermine or reveal the sensitive information in the record. Such a provision is frequently referred as a "neither confirm nor deny" provision.

Sections 20 and 21 of the Bill provide for similar amendments to sections 27 (records which contain commercially sensitive information) and 28 (where access to the records would involve the disclosure of personal information) of the Act. Sections 6 (paragraph (a)), 8 and 9 are consequential amendments following on the amendments proposed at sections 19, 20 and 21.

Comment

The FOI Manual produced by the Central Policy Unit of the Department of Finance explains that the use of the 'neither confirm nor deny' provisions will be justified only in rare situations and that such a provision is necessary because, in some instances, merely confirming the existence of information will directly or implicitly disclose sensitive information. I recognise that there may be circumstances where records contain material of such a sensitive nature that I should be in a position to uphold a decision of a public body under one of the 'neither confirm nor deny' provisions but such a decision must be supported by reasonable argument.

In considering the proposed amendment to section 26 (information given in confidence), I would also draw attention to the provisions of section 23 which concern records relating to law enforcement and public safety, and, in particular, records, access to which could reasonably be expected to reveal the identity of a person who has given information in confidence in relation to the enforcement or administration of the civil law, or any other source of such information. As I have said above, section 23(2) already has a 'neither confirm nor deny' provision. My experience to date is that a great deal of highly sensitive information received by public bodies in confidence may fall within the provisions of section 23, which provides for a Ministerial certificate, in addition to section 26 (which also provides for a Ministerial Certificate).

SECTION 29 (2)

Section 29(2) as currently framed sets out the procedures to be followed in relation to consulting with third parties in specific instances.

Proposed Amendments

Section 22 of the Bill provides for the insertion into section 29 of subsection (2A) which provides for the extension of the period for the notification of the persons identified in subsection (2) as requiring notification by a further two weeks in cases where the request relates to such number of records or where the number of persons required to be notified is

such that compliance with subsection (2) is not reasonably possible. The requester must be notified of the period of, and reasons for, the extension.

Comment

I am aware that some public bodies have, in the past, been unable to comply with the requirement to notify all relevant third parties within two weeks of receiving a request as provided for in section 29(2) in view of the considerable number of third parties requiring notification and, in some cases, in view of the considerable number of records involved, while others have had great difficulty in so complying.

SECTION 34

Section 34 of the Act as it stands sets out the parameters within which the Information Commissioner conducts his or her reviews.

Proposed Amendment

Amongst other changes to section 34 the Bill provides the amendment of 34(4)(a) to provide the Information Commissioner with the discretion to accept a late application for a review of a decision to extend the time limit for the consideration of a request under section 9 (extension of time for consideration of a request under section 9) or a decision on a request to which section 29 applies.

Comment

As things currently stand, an application for a review by the Information Commissioner of a decision on a request to which section 29 applies (where certain relevant persons were required to be notified of the request) must be made "not later than 2 weeks after the notification of the decision to the relevant person concerned" and I have no discretion to accept late applications. The proposed amendment would allow me to accept late applications for review where I am of the opinion that there are reasonable grounds for doing so.

However, it seems to me that the amendment as proposed may give rise to a practical

difficulty. Where a public body decides to release records on foot of a request to which section 29 applies, the body is required to defer the release of the records until such time as the period for making an application to my Office for a review of that decision expires, i.e. within two weeks of the date of notification of the decision. If no such application has been made within the specified period, the body is free to release the records. However, the potential for the acceptance by my Office of late applications in such cases may result in uncertainty within public bodies as to when they should release any such records. It is probable that this amendment, if accepted, will require the creation of protocols for dealing with this issue.

SECTION 46 (1) (d)

Section 46 (1) of the Act identifies particular classes of records to which the Act does not apply.

Proposed Amendments

Under section 25 of the Bill, Section 46(1) of the Act is to be amended by inserting new paragraphs before paragraph (e), the purpose of which is to:

1) exclude from the Act a record relating to the costing by a public body of a proposal of a political party (46(1)(da)), and

2) to restrict the Act from applying to parliamentary briefing records including records created for the purpose of briefing for parliamentary questions (whether oral or written) (46(1)(db)).

SAMPLE CASES

I have not issued a decision in relation to the first proposed amendment. I did, however, receive an appeal on 3 December, 2002 on a related case seeking the costings provided by the Department of Finance to various political parties in the run-up to the last election. The review is ongoing and a decision should issue shortly.

Comment

It is clear that the amendment as proposed would exempt such issues in the future.

With regard to the second proposed amendment, my experience of the operation of the Act over the course of my reviews has been that this material has generally been released as a matter of course. For example, in the case of Mr. ABD and the Department of Marine and Natural Resources, however, I was made aware that the Department, as part of its original decision, released to Mr. ABD a copy of the parliamentary question from Mr. Enda Kenny TD along with the reply by Minister Michael Woods and supporting information.

Comment

As I had no need to review records already released I did not have sight of the "supporting information" mentioned above. As such, I am not in a position to say definitively if the information in this case constituted the type of record envisaged in the proposed amendment. If it did, the proposed amendment would mean that the Act would no longer apply to them.

SECTION 47

Section 47 currently provides for the charging of fees by public bodies in respect of the grant of a request under the Act. Currently, such fees are limited to the estimated cost of the search for and retrieval of the records and the estimated copying cost of the records and are, in certain circumstances, disregarded where the records contain only personal information or may be reduced where the information contained in the record would be of particular assistance to the understanding of an issue of national importance. Section 47 also provides for the charging of a deposit by public bodies where the estimated cost for search and retrieval is likely to exceed £40 (approx. €51).

Proposed Amendment

Section 26 of the Bill allows for the charging of a fee (as prescribed by the Minister for Finance) in respect of a request for access to non-personal records and for the charging of fees in respect of applications for internal review and in respect of an application for review to my Office.

Comment

The experience of my Office to date is that relatively few applications for review relate to a

decision of a public body to charge a fee. Whereas 10 such applications were accepted for review by my Office in 1999, only 5 such applications were accepted in 2000 and only 1 in 2001. Where applications are received in such cases they can sometimes be resolved be agreement between the parties. Where a decision has been necessary, my decisions have, in the majority of cases, affirmed the public body's decision to charge the fee. It is also apparent to me from the many cases which come before me on review, that frequently public bodies do not charge fees or deposits as provided for in section 47.

Currently no fee is chargeable for the making of applications for review to my Office. Clearly the accounting and processing of fees and the screening / validation issues arising will result in an increased administrative burden on my Office.

The proposed amendment provides that an application for review shall be refused and deemed for the purposes of the Act not to have been made where the prescribed fee has not been paid. In the case of applications for review to my Office which must be made within the (current) two week time period, I foresee that this may cause procedural and administrative difficulties.

The proposed application fee will only apply to requests for access to records and not to applications for reasons for decisions (section 18) or to amend records (section 17).

It is unclear what the effect of the new paragraph 6(A)(d) will be - will an application fee and a search/retrieval fee and copying fee be chargeable on a cumulative basis?

Appendix II

Amendments to Improve the Operation the FOI Act

Long Title

- In order to remove any confusion as to whether the right of access is confined to natural persons, it is suggested that the reference to "members of the public" (in line 1) should be changed to "persons".

Section 2 (Interpretation)

- It is felt that a definition of "person", in line with the Interpretation Act, 1937 should be incorporated into this section of the Act but without the reference to "contrary intention". The definition might read;
  "Person. The word "person" shall, ~~unless the contrary intention appears~~, be construed as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons as well as an individual;"
- It is suggested that an amendment is necessary in order to deal with the confusion arising from the comments of Finnegan J. in the *Rogers* judgement when he held that the creation of copies of records by the DPP for inclusion in the Book of Evidence was the creation of a record by the DPP. There are wider implications of this, for example, the making of a copy of a pre-commencement record after the commencement date could be regarded as amounting to the creation of a post commencement record. It is not believed that this was what the Oireachtas intended and accordingly it is proposed that the definition of "record" should provide that a copy of a record is not, for the purposes of the FOI Act, to be construed as separate and distinct from the original record (except where the copy has had material added e.g. in the form of an annotation). Alternatively, it may be considered more appropriate to deal with this issue under section 6(5) by deeming that any copy taken of a pre-commencement record does not amount to a post-commencement record and/or perhaps under section 22(1) by providing that any copies taken of existing records, for the purposes of legal proceedings/advice, are to be considered as records in their own right.
- Section 29 deals with instances where an existing exemption is overruled by the relevant public interest test within that exemption; section 28(5) has two separate provisions and only one of them, at (a), has to do with the public interest. Accordingly, an amendment is suggested whereby the definition of a "request to which section 29 applies" should read "section 28(5)**(a)**" rather than "section 28(5)".

Section 3

- If it cannot be achieved through regulation, it is suggested that section 3 should be altered with the insertion of the following key requirements;

(a) an obligation on the Minister for Finance to collect, collate and publish (within two months of the end of each calendar) relevant statistics in relation to FOI usage in the relevant year, and

(b) an obligation on public bodies to provide the Minister with such statistics, and in such manner (including timescale) as the Minister determines, in relation to FOI usage in the relevant year.

Section 4(5)

- It appears that this provision is not being observed and is a burden on public bodies. As the provision has no obvious value and could be used to highlight non-compliance on the part of public bodies, it is suggested that it should be removed from the Act.

Section 12(2)(b)(ii)

- A strict interpretation of this provision suggests that virtually every written communication (apart from copyright owned by the State, the Government or the public body concerned), is subject to copyright and therefore, in principle, all kinds of very ordinary records might not be capable of being made available by way of copy. It is suggested that this section should be amended to limit the reference to infringement of copyright to one where infringement would, in the opinion of the head, be likely to result in financial loss to, or other significant impairment of the rights of, the copyright holder. This proposed amendment would presumably require consultation with the Department of Enterprise, Trade and Employment.

Section 15

- It is suggested that a provision might be inserted to the effect that the requirement to publish a section 15 manual is satisfied where the manual is published electronically (e.g. on the public body's website or by provision of a CD) provided that a request for a print-out of the manual, in whole or in part, is met.
- Section 15(4) is now redundant and was never a practical proposition and therefore it is proposed that this provision should be removed from the Act.
- Section 15(7) is somewhat confusing in that it provides for a section 15 manual being available "for removal free of charge ..." whilst also stating that in certain circumstances it may be available "for purchase". It is suggested that the manual should be available free of charge in all circumstances.

Section 16

- Similar to section 15 above, it is suggested that a provision might be inserted to the effect that the requirement to publish a section 16 manual is satisfied where the manual is published electronically (e.g. on the public body's website) provided that a request for a print-out of the manual, in whole or in part, is met. Furthermore, where the manual is published electronically, with no full paper version published, public bodies should be required to publish electronically with a print-out, if requested, a document which describes the range of material in the manual and offers to provide paper copies of the contents (or those parts of interest) to any person.

Section 17

- It is suggested that consideration might be given to extending the scope of this section to include the amendment of records relating to personal information whose release is provided for outside of the Act, as per section 46(2). It is considered somewhat incongruous that, by virtue of section 46(2), a requester cannot succeed in having a record amended which contains incomplete, incorrect or misleading personal information which is available to be inspected by members of the public. Where a record is only available to members of staff of the public body, s/he can seek to amend it although far greater damage could be caused to the requester in the case where the record is available for inspection by members of the public. Consideration might also be given to extending this principle to section 18.

Section 18

- It is recommended that this section should clarify that the right of access to information regarding acts of public bodies applies only in respect of "acts" taken since the commencement of the FOI Act although the head may decide to extent this right of access in certain circumstances. Furthermore, it is also suggested that applications under this provision must be made within twelve months of the applicant becoming aware of the "act" that affects him/her unless there are particular circumstances that, in the opinion of the head, justify an extension of this period.

Sections 17 and 18

- Neither of these sections provides for a parent, guardian or the next of kin to be entitled to act on behalf of a minor, intellectually disabled person or a deceased person in the same way as section 28(6) provides for regulations to be made enabling parents/guardians to gain access to records. It is suggested that an amendment might be considered to provide for a similar approach to sections 17 and 18 as already exists in respect of access to records.

Section 22(1)(b)

- Having regard to the decision of O'Neill J. in the recent case of *EH and the Information Commissioner*, it is suggested that this section should be amended to reflect the fact that release of records is not prohibited in cases where records have been the subject of an order of discovery and where there has not been an express undertaking to the court in relation to those records nor has the court made a specific order in relation to them.

Section 23(1)(c)

- It is suggested that the term "or make more likely" should be added to this provision after the word "facilitate".

Section 26

- In order to deal with, amongst other things, instances in which public bodies have used

confidentiality clauses in contracts or settlements and where this might have been done to avoid release under the FOI Act, it is suggested that the public interest test in section 26(3) should be extended to paragraphs (a) and (b) of section 26(1).

Section 29

- Section 29 deals with instances where an existing exemption is overruled by the relevant public interest test within that exemption. However, as section 28(5) has two separate provisions and only one of them, at (a), has to do with the public interest, it is recommended that all references to section 28(5) should be amended to read section 28(5)(a). This proposed change mirrors the amendment proposed at section 2 re. Interpretation.
- Section 29 provides that a public body must notify third parties of an FOI request where it considers that the request is one to which section 26 (3), 27(3) or 28(5) applies but falls to be granted in the public interest. The situation is complex where only some of the records coming within the scope of the request are subject to the notification process and it is suggested that the situation be clarified in the amending legislation.
  It is the view of this Office that a review by the Commissioner of a decision under section 34(1)(f) relates only to those **records**, or parts of records, to which section 26(3), or 27(3) applies, or to which 28(5) applies, and which apart from section 29 would fall to be granted. The decision on any other records or parts of records in the same request is not a decision on a request to which section 29 applies and an appeal of the decision on those records or parts of records should, therefore, be by way of internal review.
  One possible implication of an alternative interpretation, which says that a decision/request cannot be split in such a manner, is that the Commissioner could review the decision on records which were not the subject of an appeal by any party. It would seem that the most practical resolution would be that the Act should be amended to confirm that the splitting of a decision, as outlined above, is appropriate.

- The FOI Act does not envisage that a formal section 29 notification process can take place at internal review. While this Office accepts that a decision on a request to which section 29 applies may be made on internal review in certain circumstance (page 33 of this Office's Section 16 manual refers), it is the view of this Office that the Act should be amended to specifically provide for a formal section 29 process at internal review and to allow for an appeal by a third party against a decision to release records affecting their interests where appropriate.
- The following two options might also be considered in an effort to bring greater clarity to this section:
  1. Consideration might be given to amending Section 29 to bring it into line with other provisions of the Act whereby it would provide for an internal review in all cases where the requester or third party (parties) is unhappy with the original decision of the public body. Only after internal review would the decision be appealed to this Office. This proposed change would have the effect of removing much of the confusion surrounding this section particularly in cases where the application has to be split.
  2. Alternatively, consideration might be given to providing that a direct appeal to this Office (i.e. without internal review) would only be permitted in cases where the original decision is to release the record(s) in question. If the original decision is to

withhold, then the internal review procedure should apply.

Section 32

- Further to the amendment proposed at section 12(2)(b)(ii) above, it is suggested that the current copyright legislation should be consulted in regard to whether its provisions contain anything that amounts to a prohibition on disclosure. It is our understanding that copyright law does not provide for a prohibition on disclosure but does limit (in the absence of the consent of the copyright holder) the manner in which disclosure may be made. However, if there is a prohibition on disclosure within the copyright law, perhaps it may be possible to use the Third Schedule to mitigate the extent of that prohibition in the FOI context.
- Notwithstanding the fact that the Minister for Finance has previously made amending regulations in this area, it is suggested that an additional provision should be added to section 32(3) providing a right to make regulations allowing legislation to be added to the Third Schedule of the Act. This right should not extend to permitting the removal of legislation but in allowing the addition of same, it would facilitate the inclusion of, for example, the Food Safety legislation on to the Schedule.

Section 33(4) and (5)

- These provisions impose a bar on the Commissioner holding any other office which attracts emoluments (Rule 4 of the Second Schedule). There is an equivalent provision in relation to the Ombudsman at Section 2(6) of the Ombudsman Act. Where the same person holds the two offices, the effect of section 33(4) and (5) seems to be that neither of these restrictions applies. In effect, a person who simultaneously holds the Ombudsman and Information Commissioner offices seems not to be barred from holding an additional (third) Office for which emoluments are payable, whilst a person who holds only one of the two offices is barred from holding even a second office for which emoluments are payable.

Section 34(3)

- Section 34(3)(b) provides that the Commissioner shall make a decision on a review, as far as practicable, not later than three months after receipt of the application. In light of the experience of this Office, it is suggested that consideration might be given to extending this period for completion of a review to four months.

Section 34(5)

- This provision currently requires that withdrawal of a review application must be done in writing. However, many applicants are slow to write to this Office confirming a withdrawal of their application. It is therefore suggested that this provision should be amended to allow a withdrawal to be done orally with the Commissioner confirming this in writing to the applicant and also informing the public body that this has happened.

Section 34(9)

- In light of the experience of this Office**,** it is proposed that the following additional

grounds for the Commissioner to discontinue a review should be added to this provision;

- where the applicant fails to provide the Commissioner with sufficient information or otherwise fails to co-operate with the Commissioner in the conduct of a review, and

- where, in the course of the review, access to the records in question has been granted by the public body and where the Commissioner is satisfied that there is no longer any issue requiring adjudication by his Office.

Section 37(7)

- It is proposed that the maximum fine for failing or refusing to comply with a requirement or for hindering or obstructing the Commissioner should be increased to EURO 10,000 and/or six months imprisonment.

Section 42(4)

- This section provides that the time limit for appealing a decision of the Commissioner to the High Court is four weeks. There is however an anomaly whereby, in certain circumstances, a requester who is being granted partial access to records will not receive those records until after the time for a High Court appeal has expired; in such circumstances, the requester will not know whether he or she is satisfied with the Commissioner's decision until after the time for the making of an appeal has expired. This situation may arise where a third party, other than the requester, has an interest in the release of the records and, because of the operation of section 44, there is a stay on the implementation of the Commissioner's decision. This stay is to protect the rights of the third party. However, an unintended consequence is that the requester cannot be given the records until after the appeal period has expired. This Office has had one instance of a High Court appeal made "on the blind" in such circumstances. Accordingly, an amendment to section 42(2) is suggested whereby the time for an appeal in such cases might be extended by two weeks following the actual release of the records.

Section 43(3)

- An amendment to this section is suggested in order to provide that the Commissioner is governed by a provision similar to section 8(5) which provides that a public body may withhold in a decision material which, were it to be included in a record <u>would</u> be exempt material whereas section 43(3) deals only with material actually contained in an exempt record. The relevance of this is that section 8(5) might form the basis for an approach under which, in a case involving a risk to personal safety, the full grounds for a decision to refuse, e.g. fear that the requester may become violent, might not have to be given. At present, it appears the section 8(5) option may not be available to the Commissioner.

Section 46

- This section lists the restrictions of the Act but it is suggested that an amendment is necessary, either in this section or perhaps within section 34(1), in order to clarify that the review jurisdiction of the Commissioner extends to deciding whether a public body has correctly invoked section 46. If the Commissioner does not have such jurisdiction, then requesters will have no free, independent review mechanism in cases of this kind and the public bodies concerned will not be subject to any scrutiny as to how they behave in this

area.

Suggested New Provisions

- The question of some kind of a personal safety clause is something that this Office has been considering and was the subject of a separate paper sent to the Department of Finance recently. A key issue in relation to such a personal safety clause is whether, in appropriate cases, it will be permissible to withhold from the requester the full reasons for the decision to refuse his request.

- Another area we are considering is that of the interaction of data protection law with FOI. This is an issue that could have a critical bearing on the conduct of reviews by this Office. In summary, it appears that an application under the Data Protection Act (DPA) could result in data held by the OIC being accessible to the data subject in circumstances where the same data might not be releasable under the FOI Act. This opens the prospect of the FOI Act being undermined particularly as the restriction provided by section 43(3) of the FOI Act only allows the Commissioner to act in "the performance of his or her functions under this (FOI) Act..." and not in relation to the DPA. The extent of the problem is magnified by virtue of the fact that it is assumed that the 1995 EU Directive is now applicable (even in the absence of national legislation) and that access rights under the Directive include a right of access to paper files containing personal data. Sensitive paper records given to the OIC for purposes of a FOI appeal cannot, as things stand, be guaranteed exemption from release under the EU Directive on data protection. Unfortunately, this Office does not have the option of seeking a regulation under section 5(2) and 5(3)(b) of the DPA to extend the restriction on release of records provided by section 43(3) of the FOI Act into the area of the DPA. It appears that this problem can only be dealt with by way of primary legislation either in the context of the DP (Amendment) Bill or, possibly, in the context of an amendment to the FOI Act. The Information Commissioner has already suggested a form of words to address this issue to the Department of Justice, Equality and Law Reform for inclusion in the Data Protection (Amendment) Bill. At the time of writing, it is not yet clear if his suggested wording will be included in the Amendment Bill. In this context, the possibility of an amendment to the FOI Act will need to be kept under review.

Office of the Information Commissioner
3 February 2003